

August 17, 2018

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
POWERTECH USA, INC.)	Docket No. 40-9075-MLA
)	
(Dewey-Burdock)	
In Situ Uranium Recovery Facility))	

NRC STAFF'S MOTION FOR SUMMARY DISPOSITION OF
CONTENTION 1A

The Staff of the Nuclear Regulatory Commission accepted for review Powertech USA, Inc.'s materials license application for the Dewey-Burdock *in situ* uranium recovery (ISR) project in October 2009. The next month, the Staff requested a meeting with the leadership of the Oglala Sioux Tribe, the Tribe in closest proximity to the Dewey-Burdock site, to discuss Powertech's application. Since that time, over the course of this lengthy proceeding, the Staff has consistently engaged with the Tribe to complete its obligations under the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA) to fulfill its obligation to consider how the Dewey-Burdock project may affect Native American Tribes' historic and cultural resources. The Atomic Safety and Licensing Board has agreed that the Staff complied with the NHPA,¹ but has not yet found that the Staff has taken a "hard look" at tribal cultural resources under NEPA; this matter has been litigated in this case as the Oglala Sioux Tribe's and Consolidated Intervenor's (together, the Intervenor's) Contention 1A. As

¹ The Board initially determined, in its merits ruling on Contention 1B in this matter, that the Staff had not complied with the NHPA. *Powertech (USA) Inc. (Dewey-Burdock In Situ Uranium Recovery Facility)*, LBP-15-16, 81 NRC 618, 633 (2015), *aff'd*, CLI-16-20, 84 NRC 219 (2016). The Board has since determined, as discussed further below, that the Staff has satisfied its NHPA obligations in this matter. *Powertech (USA), Inc. (Dewey-Burdock In Situ Uranium Recovery Facility)*, LBP-17-9, 86 NRC 167 (2017).

discussed herein, the Staff has continued to undertake measures to remedy the NEPA deficiencies found by the Board in this case, and it has reached the point where the Staff has taken the requisite “hard look” under NEPA and can reasonably do no more.

The Staff therefore moves for summary disposition of Contention 1A. Following the Board’s decision in LBP-15-16, the Staff engaged with the parties in this proceeding, including the Tribe, to select and implement a survey approach that comprised a reasonable methodology for obtaining additional information on Lakota Sioux Tribes’ cultural resources that may be impacted by the Dewey-Burdock project. The Staff’s selected approach responded to the Tribe’s material concerns regarding the necessary features of a survey methodology and was described by the Tribe as providing a reasonable path toward satisfying NEPA. Although the Staff was precluded from fully effectuating the approach, the undisputed facts show that the Staff assessed the potential impacts from the Dewey-Burdock project on cultural resources in the Final Supplemental Environmental Impact Statement (FSEIS) and adopted a reasonable methodology to obtain additional information on Lakota Sioux cultural resources. Accordingly, there remains no genuine issue of material fact relative to Contention 1A and the Staff has demonstrated that it should prevail on this contention as a matter of law. The Board should therefore resolve Contention 1A in favor of the Staff and terminate the proceeding.

BACKGROUND

I. Background: the Staff's Environmental Review of Historic and Cultural Resources and Contention 1A

The procedural history of this case is lengthy, and the Staff does not repeat it.² As relevant here, in accordance with 10 C.F.R. Part 51, the Staff prepared a FSEIS for the Dewey-Burdock project.³ In the FSEIS, the Staff evaluated information about Native American Tribes' cultural resources that it was able to obtain without the specific input of the Lakota Sioux Tribes. In Chapter 3 of the FSEIS, the Staff described various types of sites that could have been identified as sites of significance to Native American Tribes if the Lakota Sioux Tribes had provided information to the Staff regarding field survey results.⁴ The Staff described the cultural history of the Black Hills with reference to the Lakota Sioux' connection to the area, including the religious and cultural significance of the Black Hills to the Lakota Sioux.⁵ In addition, in the FSEIS, the Staff evaluated how the Dewey-Burdock project might affect *all* sites within the area of potential effects, not merely those sites that were eligible for listing on the National Register of Historic Places.⁶ The Staff presented its impact determinations in the FSEIS, along with its

² For additional background on Contention 1A, as well as background on the Staff's review of historic and cultural resources, see NRC Staff's Petition for Review of LBP-15-16 at 2–11 (May 26, 2015) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML15146A499; Exhibit (Ex.) NRC-001, Initial Testimony and Affidavits from Haimanot Yilma, Kellee L. Jamerson, Thomas Lancaster, James Prikryl, and Amy Hester [hereinafter Initial Staff Testimony] at A1.1–A.1.19 (June 20, 2014); Exs. NRC-008-A-1, NUREG-1910, Supplement 4, "Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota: Supplement to the Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities" (Vol. 1) (ADAMS Accession No. ML14024A477) at 76–84 and NRC-008-A-2, FSEIS, Vol. 2 (ADAMS Accession No. ML14024A478), at 474–87; Ex. NRC-015, Dewey-Burdock ISR Project Summary of Tribal Outreach (ADAMS Accession No. ML14099A010) (summarizing the Staff's consultations with Native American Tribes).

³ Exs. NRC-008-A-1 through NRC-008-B-2 [hereinafter FSEIS].

⁴ Ex. NRC-008-A-1, FSEIS, at 257–63.

⁵ *Id.* at 247, 257–59.

⁶ Ex. NRC-008-A-2, FSEIS, at 466–86.



recommended measures to mitigate these impacts.⁷ After the Staff completed its evaluations, it provided the impact assessments and mitigation recommendations to all consulting Tribes for comment—including the Oglala Sioux Tribe—as it had committed to doing when it released the Draft SEIS.⁸

The Staff concluded that the overall potential impacts to historic and cultural resources from the Dewey-Burdock project would range from SMALL to LARGE.⁹ Further, in accordance with 36 C.F.R. §§ 800.4(b)(2) and 800.14(b), the Staff finalized a programmatic agreement for the Dewey-Burdock project.¹⁰ The Staff thereafter issued a Record of Decision for its NEPA

⁷ *Id.* at 474–86. In particular, in Tables 4.9-1 through 4.9-6, the Staff provided its determinations regarding both environmental impacts and National Register of Historic Places eligibility. In these tables the Staff also included a column titled “Management Recommendation/Comments,” which lists its mitigation recommendations under both the NHPA and NEPA. *Id.*

⁸ Exs. NRC-058 and NRC-061 through NRC-063. These exhibits include the following documents: Letter to Oglala Sioux Tribe Transmitting TCP Survey Report for Dewey-Burdock Project (ADAMS Accession No. ML13357A234) (December 23, 2013); NRC’s Overall Determinations of Eligibility and Assessments of Effects (ADAMS Accession No. ML13343A155) (December 16, 2013); NRC NRHP Determinations (ADAMS Accession No. ML13343A155) (December 23, 2013); Table 1.0 for Draft PA (ADAMS Accession No. ML13354B948) (December 13, 2012). The Staff sent copies of these documents to all consulting Tribes.

⁹ Ex. NRC-008-A-1, FSEIS, at 43-44; Ex. NRC-008-A-2, FSEIS, at 462–95, 586. The Staff determined that the overall potential impacts to cultural and historic resources from construction of the Dewey-Burdock project would range from “SMALL to LARGE.” The Staff determined that the overall impacts from other phases of the project, such as operation and aquifer restoration, would range from “SMALL” or “SMALL to MODERATE” impacts on cultural resources because mitigation measures would be imposed before facility construction for both known and any newly discovered cultural resources in accordance with Condition 9.8 of Powertech’s license. Ex. NRC-008-A-1, FSEIS, at 43-44; Ex. NRC-008-A-2, FSEIS, at 462–95, 495; Ex. NRC-012, Powertech Source Material License No. SUA-1600 [hereinafter Powertech License], at 5–6. Pursuant to License Condition 9.8, Powertech is required to cease “any work resulting in the discovery of previously unknown cultural artifacts[.]” Ex. NRC-012 at 5–6. All newly discovered artifacts would be inventoried and evaluated in accordance with 36 C.F.R. Part 800, and work could not restart without authorization to proceed from the NRC, the South Dakota State Historic Preservation Officer (SHPO), and the Bureau of Land Management. Ex. NRC-008-A-2, FSEIS, at 43–44; Ex. NRC-012, Powertech License, at 5–6.

¹⁰ Exs. NRC-018-A through NRC-018-H, Final Programmatic Agreement for the Dewey-Burdock Project (ADAMS Accession No. ML14066A347). The Dewey-Burdock Programmatic Agreement documents the steps the NRC will take to protect currently identified historic properties, unevaluated properties, and the approach to be used to protect as-yet unidentified properties that could be affected by implementation of the project. Ex. NRC-018-A at 10–11. The signatories to the Programmatic Agreement included the NRC, Powertech, the Advisory Council on Historic Preservation (ACHP), the South Dakota SHPO, and the Bureau of Land Management. Of particular note, upon signing the Programmatic Agreement, the ACHP stated, “based on the background documentation, the issues addressed during consultation, and the processes established in the [Programmatic Agreement], [it] concluded that the content and spirit of

review and the materials license for the Dewey-Burdock project.¹¹ The issuance of the Record of Decision and license reflected the Staff's determination that additional information on Lakota Sioux cultural resources was not essential to a reasoned choice among alternatives.

An evidentiary hearing was held in this proceeding concerning the adequacy of certain aspects of the Staff's FSEIS.¹² In particular, the Board admitted two contentions proffered by the Oglala Sioux Tribe related to cultural resources.¹³ In Contention 1A, as admitted and migrated by the Board, the Tribe and the Consolidated Intervenors asserted that the FSEIS failed to meet applicable legal requirements regarding protection of historical and cultural resources.¹⁴ Specifically, the Tribe and the Consolidated Intervenors asserted that while 10 C.F.R. §§ 51.71(d), 51.45(b) and NEPA require the FSEIS to include an analysis of cultural impacts, "neither [the applicant nor the NRC Staff] has conducted an adequate and competent cultural resources survey, impacts analysis, or mitigation review."¹⁵

the Section 106 process has been met by [the] NRC." Ex. NRC-031, Letter from John Fowler, Executive Director, ACHP, to Waste' Win Young, Standing Rock Sioux Tribe Historic Preservation Officer (ADAMS Accession No. ML14115A448) (Apr. 7, 2014). The Staff's record of reasonable, good-faith consultation with Tribes, including the Oglala Sioux Tribe, on the Programmatic Agreement—as required by 36 C.F.R. § 800.14(b)(2)(I)—is documented in its prior pleadings, testimony, and exhibits, herein incorporated by reference. See, e.g., Ex. NRC-008-A-1, FSEIS, Vol. 1 at 76–84; Ex. NRC-008-A-2, FSEIS, Vol. 1, at 474–87; Ex. NRC-001, Initial Staff Testimony at A1.1–A.1.19; Ex. NRC-015, Dewey-Burdock ISR Project Summary of Tribal Outreach (ADAMS Accession No. ML14099A010); NRC Staff's Petition for Review of LBP-15-16 at 23–25 (May 26, 2015) (ADAMS Accession No. ML15146A499); NRC Staff's Motion for Summary Disposition of Contentions 1A and 1B (Aug. 3, 2017) (ADAMS Accession No. ML17215B356).

¹¹ Exs. NRC-011, NRC Record of Decision for the Dewey-Burdock Uranium In-Situ Recovery Project (ADAMS Accession No. ML14066A466) (Apr. 8, 2014) and NRC-012, Powertech License, respectively.

¹² *Powertech*, LBP-15-16, 81 NRC at 633.

¹³ *Id.* at 629–30.

¹⁴ *Powertech USA, Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-14-5, 79 NRC 377, 385, 401 (2014).

¹⁵ *Powertech*, LBP-15-16, 81 NRC at 650 (quoting Oglala Sioux Tribe Post-Hearing Initial Brief at 13) (internal quotations omitted).

II. The Board's Partial Initial Decision on Contention 1A and the Commission's Review of that Decision

Following the evidentiary hearing, the Board issued its Partial Initial Decision on the admitted contentions in this proceeding, including Contention 1A.¹⁶ The Board resolved Contention 1A in favor of the Intervenor.¹⁷ The Board held that the Staff failed to meet the “hard look” standard of NEPA when considering how the Dewey-Burdock project may affect Lakota Sioux cultural resources.¹⁸ In resolving Contention 1A, the Board held that the Staff complied with the NHPA requirement to make a good faith and reasonable effort to identify properties eligible for inclusion in the National Register of Historic Places.¹⁹ But the Board found that the information required to analyze impacts to sites of cultural, historic, or religious significance to the Oglala Sioux Tribe under NEPA is broader than that required under the NHPA and is obtainable only from the Tribe itself.²⁰ Noting that the previously conducted tribal surveys of the Powertech site “did not contain any tribal ethnographic studies, oral histories or a survey of sites of significance to . . . the Oglala Sioux Tribe,” the Board concluded that the FSEIS was deficient under NEPA.²¹ The Board ruled that the Staff could remedy the deficiencies identified by the Board “by promptly initiating a government-to-government consultation with the Oglala Sioux Tribe to identify any adverse effects to cultural, historic or religious sites of significance to the Oglala Sioux Tribe which may be impacted by the Powertech Dewey-Burdock project,” and by adopting measures to mitigate such adverse

¹⁶ *Id.* at 618.

¹⁷ *Id.* at 653–57.

¹⁸ *Id.* at 657.

¹⁹ *Id.* at 654.

²⁰ *Id.* at 654–55.

²¹ *Id.* at 655 n.219.

effects, as necessary.²² The Board retained jurisdiction of the case pending the Staff's curing of these deficiencies.²³

Thereafter, each party submitted a petition for review of LBP-15-16 to the Commission.²⁴ The Commission took review of these petitions in part and denied each party's petition for review of the Board's ruling on Contention 1A.²⁵ The Commission left in place the Board's ruling in favor of the Intervenor on the contention and, pursuant to its inherent supervisory authority over agency adjudications, left the proceeding open "for the narrow issue of resolving the deficiencies identified by the Board."²⁶ The Staff thereafter submitted periodic reports to the Board, documenting its progress in resolving the issues that the Board identified.

²² *Id.* at 657–58, 708.

²³ *Id.* at 658.

²⁴ Oglala Sioux Tribe's Petition for Review of LBP-15-16 and Decisions Finding Tribal Contentions Inadmissible (May 26, 2015) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML15146A500); Consolidated Intervenor's Petition for Review of LBP-15-16 (May 26, 2015) (ADAMS Accession No. ML15147A069); Brief of Powertech (USA), Inc. Petition for Review of LBP-15-16 (May 26, 2015) (ADAMS Accession No. ML15146A495); NRC Staff's Petition for Review of LBP-15-16 (May 26, 2015) (ADAMS Accession No. ML15146A499).

²⁵ *Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), CLI-16-20, 84 NRC 219, 222 (2016).

²⁶ *Id.* at 242; see also *id.* at 222, 262.

III. The Board's Decision on the Staff's Motion for Summary Disposition of Contention 1A

In August 2017, the Staff sought summary disposition of Contention 1A.²⁷ The Board denied the Staff's motion with respect to Contention 1A.²⁸ In denying summary disposition of the contention, the Board held that it was unable to conclude that the Staff had fulfilled its NEPA obligation relative to cultural resources of Native American Tribes "because (1) the NRC Staff has yet to conduct a study or survey [of tribal cultural resources]—and thus the FSEIS deficiencies remain; and (2) there remains a material factual dispute as to whether the NRC Staff's chosen methodology for obtaining information on the tribal cultural resources was reasonable."²⁹ Specifically, the Board found that "the Oglala Sioux Tribe's challenge to (1) the scientific integrity and lack of a trained surveyor or ethnographer coordinating the survey; (2) the number of tribal members invited to participate in the survey; (3) the length of time provided for the survey; and (4) the Tribes invited to participate in the survey—establish a significant material factual dispute as to the reasonableness of the NRC Staff's proposed terms for an open-site survey to assess the identified deficiencies in this FSEIS."³⁰

The Board observed that "it certainly is not too late for the NRC Staff to consider an alternative method or framework for assessing impacts to tribal cultural resources and, if appropriate, to move for summary disposition if it opts for an alternative to its currently proposed

²⁷ NRC Staff's Motion for Summary Disposition of Contentions 1A and 1B (Aug. 3, 2017) (ADAMS Accession No. ML17215B356). The Staff also moved for summary disposition of Contention 1B. *Id.* Powertech supported the Staff's motion; the intervenors opposed it. See Brief of Powertech (USA), Inc. in Support of United States Nuclear Regulatory Commission Staff's Motion for Summary Disposition of Contentions 1A and 1B (Sept. 1, 2017) (ADAMS Accession No. ML17244A932); Oglala Sioux Tribe's Response in Opposition to NRC Staff Motion for Summary Disposition of Contentions 1A and 1B (Sept. 1, 2017) (ADAMS Accession No. ML17244A910); Consolidated Intervenors' Opposition to Motion for Summary Disposition of Contentions 1A and 1B (Sept. 1, 2017) (ADAMS Accession No. ML17244A945).

²⁸ *Powertech*, LBP-17-9, 86 NRC at 167. The Board granted the Staff's motion for summary disposition of Contention 1B. *Id.*

²⁹ *Id.* at 194.

³⁰ *Id.* at 198.

open-site survey.”³¹ The Board stated that if the Staff chooses a methodology that does not include complete information about adverse effects on the Tribe’s cultural resources, the NRC Staff would need to include an explanation that satisfies the requirements of 40 C.F.R.

§ 1502.22.³² With this direction in mind, the Staff continued its work to resolve Contention 1A.

LEGAL STANDARDS

I. Legal Standards Governing Motions for Summary Disposition

Summary disposition may be granted where the relevant documents demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.³³ The moving party carries the initial burden of demonstrating that summary disposition is appropriate, and must explain in writing the basis for the motion.³⁴ To support its motion, the moving party must also attach a “short and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard.” Where such facts are properly presented and are not controverted, they are deemed to be admitted.³⁵

³¹ *Id.*

³² *Id.* at 200. On November 13, 2017, Powertech petitioned for review of the Board’s decision denying in part and granting in part the Staff’s motion for summary disposition of Contentions 1A and 1B. Brief of Licensee Powertech (USA), Inc. Petition for Review of LBP-17-9 (Nov. 13, 2017). The Commission denied Powertech’s petition, holding that Powertech’s petition failed to meet the high standard for interlocutory review and failed to show that the Board erred in denying summary disposition. *Powertech USA, Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), CLI-18-7, 88 NRC __, __ (July 24, 2018) (slip op. at 1, 7–8).

³³ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station) [hereinafter *Pilgrim*], CLI-10-11, 71 NRC 287, 297 (2010); *Advanced Med. Sys., Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102–03 (1993), *reconsid. denied*, CLI-93-24, 38 NRC 187 (1993).

³⁴ See, e.g., *Advanced Med. Sys., Inc.*, CLI-93-22, 38 NRC at 102; 10 C.F.R. § 2.1205(a). This proceeding is being conducted under the procedures for informal hearings contained in Subpart L of 10 C.F.R. Part 2. See Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2228 (Jan. 14, 2004) (“Section 2.1205 provides a simplified procedure for summary disposition in informal proceedings. The standards to be applied in ruling on such motions are those set out in Subpart G.”).

³⁵ *Dairyland Power Cooperative* (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 520 (1982).

Section 2.1205(c) of the NRC's rules of practice states, "[i]n ruling on motions for summary disposition, the presiding officer shall apply the standards for summary disposition set forth in subpart G of this part."³⁶ Subpart G, Section 2.710(d)(2), provides, in turn, that "[t]he presiding officer shall render the decision sought if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." Once the moving party makes a proper showing for summary disposition, "if the party opposing the motion does not show that a genuine issue of material fact exists, the Board may summarily dispose of all arguments on the basis of the pleadings."³⁷

II. The National Environmental Policy Act (NEPA)

Congress enacted NEPA to ensure that federal agencies make a "fully informed and well-considered decision"³⁸ on all "major Federal actions significantly affecting the quality of the human environment."³⁹ The Council on Environmental Quality (CEQ) promulgates regulations that provide guidance on agency compliance with NEPA. The NRC is not bound by those portions of CEQ's NEPA regulations that have a substantive—as opposed to procedural—impact on the way in which the Commission performs its regulatory functions.⁴⁰ These

³⁶ 10 C.F.R. § 2.1205(c).

³⁷ *Advanced Medical Systems, Inc.*, CLI-93-22, 38 NRC at 102.

³⁸ *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

³⁹ 36 C.F.R. § 800.4(b)(1).

⁴⁰ Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments, 49 Fed. Reg. 9352 (Mar. 12, 1984); *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 443–44 (2011).

regulations are not binding on the NRC where the agency has not expressly adopted them, but the Commission has accorded them considerable deference.⁴¹

A. NEPA's "Hard Look" Standard

While NEPA "does not mandate particular results,"⁴² it provides the necessary process to ensure that a federal agency takes a "hard look" at the potential environmental impacts of a proposed action⁴³ and discloses those impacts before moving forward with a planned action.⁴⁴ This "hard look" is intended to "foster both informed agency decision-making and informed public participation" so as to ensure that an agency does not act upon "incomplete information, only to regret its decision after it is too late to correct."⁴⁵

The "hard look" standard, however, is tempered by a "rule of reason," in that an agency's EIS need only contain "a reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the proposed action.⁴⁶ Under NEPA's "rule of reason," an agency need not address every environmental effect that could potentially result from the proposed action. Rather, the agency need only provide "[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences[.]"⁴⁷ The Commission has stated that "NEPA ["]should be construed in the light of reason if it is not to

⁴¹ See *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 725, 743 (3d Cir. 1989); *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-06-8, 63 NRC 241, 258 (2006).

⁴² *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

⁴³ See *La. Energy Servs., L.P.* (Claiborne Enrichment Center) [hereinafter *LES*], CLI-98-3, 47 NRC 77, 87–88 (1998).

⁴⁴ *Pogliani v. U.S. Army Corps of Engineers*, 306 F.3d 1235, 1237 (2d Cir. 2002) (citing *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 100 (1983)).

⁴⁵ *LES*, CLI-98-3, 47 NRC at 88 (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989)).

⁴⁶ *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003).

⁴⁷ *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974); see also *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026–27 (9th Cir. 1980).

demand['] virtually infinite study and resources.”⁴⁸ NEPA does not call for certainty or precision, but rather an *estimate* of anticipated impacts in an EIS.⁴⁹ As a consequence, an agency is given broad discretion “to keep [its] inquiries within appropriate and manageable boundaries.”⁵⁰ In preparing an EIS, which “is not intended to be a ‘research document,’”⁵¹ an agency “must have some discretion to draw the line and move forward with decisionmaking.”⁵² In assessing foreseeable impacts, the agency is not required to use “the best scientific methodology.”⁵³ Rather, the agency is free to “select [its] own methodology so long as that methodology is reasonable.”⁵⁴

B. Incomplete and Unavailable Information Under NEPA

While a federal agency must analyze environmental consequences in its environmental review where it is reasonably possible to do so, NEPA’s rule of reason acknowledges that in certain cases an agency may be unable to obtain information to support a complete analysis.⁵⁵ CEQ regulations require that when an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an EIS “and there is incomplete or unavailable

⁴⁸ *Pilgrim*, CLI-10-11, 71 NRC at 315 (quoting *NRDC v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988) (footnotes omitted) (quoting *NRDC v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972) (NEPA “must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible, given the obvious, that the resources of energy and research—and time—available to meet the Nation’s needs are not infinite”)).

⁴⁹ *La. Energy Servs., L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 536 (2005) (emphasis in original).

⁵⁰ *LES*, CLI-98-3, 47 NRC at 103.

⁵¹ *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC 202, 208 (2010) (quoting *Town of Winthrop v. Fed. Aviation Admin.*, 535 F.3d 1, 13 (1st Cir. 2008)).

⁵² *Pilgrim*, CLI-10-11, 71 NRC at 315 (citing *Winthrop*, 535 F.3d at 11–13).

⁵³ *Id.* (citing *Hells Canyon All. v. U.S. Forest Serv.*, 227 F.3d 1170, 1185 (9th Cir. 2000)).

⁵⁴ *Id.* at 316 (quoting *Winthrop*, 535 F.3d at 13).

⁵⁵ National Environmental Policy Act Regulations; Incomplete or Unavailable Information, 51 Fed. Reg. 15618, 15622 (Apr. 25, 1986).

information, the agency shall always make clear that such information is lacking.”⁵⁶ If the incomplete or unavailable information is “essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant,” the agency shall include the information in the EIS.⁵⁷ If the overall costs of obtaining the information are exorbitant or the means to obtain it are not known, the agency must include in the EIS:

(1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency’s evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.⁵⁸

CEQ has explained that the term “overall costs” is intended to encompass “financial costs and other costs such as costs in terms of time (delay) and personnel,” and that “overall costs” should be interpreted “in light of overall program needs.”⁵⁹ CEQ has also stated that “theoretical approaches or research methods generally accepted in the scientific community” includes “commonly accepted professional practices such as literature searches[.]”⁶⁰ Federal courts have been “unwilling to give a hyper-technical reading” of 40 C.F.R. § 1502.22 to require the inclusion of a separate, formal statement in the EIS to the effect that information is incomplete or unavailable where the record in the proceeding supplies the relevant

⁵⁶ 40 C.F.R. § 1502.22.

⁵⁷ *Id.* § 1502.22(a).

⁵⁸ *Id.* § 1502.22(b). Section 1502.22 is one of the provisions by which the Commission has determined it is not bound, in that it has “a substantive impact on the way in which the Commission performs its regulatory functions.” *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 444 (2011).

⁵⁹ 51 Fed. Reg. at 15,622.

⁶⁰ *Id.*

information.⁶¹ Further, to demonstrate a violation of NEPA on the basis of 40 C.F.R. § 1502.22, a petitioner “must show (1) the missing information is essential to a reasoned decision between the alternatives, and (2) that the public was unaware of the limitations of the data the [federal agency] relied on.”⁶²

C. The Complete NEPA Record

Finally, in the context of an adjudicatory proceeding, “even if an EIS prepared by the Staff is found to be inadequate in certain respects, the Board’s findings, as well as the adjudicatory record, ‘become, in effect, part of the [final EIS].’ . . . Thus, the Board’s ultimate NEPA judgments can be made on the basis of the entire adjudicatory record in addition to the Staff’s [final EIS].”⁶³ Moreover, Boards have previously looked to the record in a proceeding to supply the information called for by 40 C.F.R. § 1502.22. For example, in the *Vogtle* early site permit proceeding, the Board found sufficient information in the record to determine that the costs of obtaining additional information related to potential impacts from dredging would likely

⁶¹ *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1172–73 (10th Cir. 1999); see also *WildEarth Guardians v. U.S. Forest Serv.*, 828 F.Supp.2d 1223, 1240 (agency satisfied 40 C.F.R. § 1502.22 where it stated that additional information on climate impacts was unavailable but that available information indicates impacts would not be significant); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1194 (D. Colo. 2014) (record supplied sufficient information on significance of missing data to satisfy 40 C.F.R. § 1502.22).

⁶² *Trout Unlimited v. U.S. Dep’t of Agric.*, 320 F. Supp. 2d 1090, 1110–11 (D. Colo. 2004) (citing *Dombeck*, 185 F.3d at 1172–73). The Commission has cautioned, in the context of SAMA analyses, that “[t]here is questionable benefit to spending considerable agency resources in an attempt to fine-tune a NEPA mitigation analysis,” noting that unless a deficiency “could credibly render the SAMA analysis altogether unreasonable under NEPA standards,” “a SAMA-related dispute will not be material to the licensing decision[.]” *Entergy Nuclear Gen. Co. and Entergy Nuclear Operations Inc.* (Pilgrim Nuclear Power Station), CLI-12-1, 75 NRC 39, 57–58 (2012). Although the contention at issue in this proceeding is not a SAMA contention, the principle is fundamental to NEPA’s “rule of reason” in the context of 40 C.F.R. § 1502.22: unless an alleged deficiency in the FSEIS would have a material impact on the agency’s licensing decision, *i.e.*, the decision between alternatives, the dispute over the deficiency is not a material one.

⁶³ *S. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site) [hereinafter *Vogtle*], LBP-09-7, 69 NRC 613, 632 (2009) (quoting *Hydro Res., Inc.* (P.O. Box 15190, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 53 (2001), and citing *La. Energy Servs., L.P.*, LBP-05-13, 61 NRC 385, 404 (2005), *aff’d*, CLI-06-22, 64 NRC 37 (2006), *petition for review denied sub nom. Nuclear Infor. & Res. Serv. v. NRC*, 509 F.3d 562 (D.C. Cir. 2007)), *petition for review denied*, CLI-10-5, 71 NRC 90 (2010)).

be exorbitant and, further, that the EIS, as supplemented by its decision, provided the additional explanation required under 40 C.F.R. § 1502.22(b).⁶⁴

DISCUSSION

There is no genuine issue as to any material fact with respect to the outstanding issues identified by the Board concerning Contention 1A. Attached to this motion is a statement of material facts on which the Staff contends there is no genuine issue to be heard.⁶⁵ As set forth below, the material facts demonstrate that as a matter of law the Staff has taken the requisite “hard look” at historic and cultural resources under NEPA.

After the Tribe rejected the Staff’s previous two offered field survey opportunities (the 2013 survey in which multiple Tribes participated, and the April 2017 survey proposal specific to the Oglala Sioux Tribe), the Staff selected an approach consisting of a new methodology for obtaining additional information on cultural resources of significance to Lakota Sioux Tribes that took into account the material concerns of the Oglala Sioux Tribe as identified by the Board in LBP-17-9.⁶⁶ The selected approach provided the Tribe a third opportunity to participate in a field survey of the Dewey-Burdock site.⁶⁷ The selected approach for obtaining additional information on Lakota Sioux Tribes’ cultural resources was reasonable because it responded to the material issues raised by the Tribe and, as the Tribe itself acknowledged, it provided a reasonable likelihood of obtaining the additional information at issue. Although the Staff’s partial implementation of the selected approach did not ultimately result in obtaining the additional information sought from the invited Tribes, the Staff’s FSEIS, as supplemented by the

⁶⁴ *Vogtle*, LBP-09-7, 69 NRC 613, 702, 731 n.52 (2009).

⁶⁵ NRC Staff’s Statement of Material Facts to Support Motion for Summary Disposition of Contention 1A (Aug. 17, 2018) (Attachment 1) [hereinafter Statement of Material Facts].

⁶⁶ *Id.* ¶¶ 1–3, 5–12, 19, 22, 24, 27–31, 37, 39–40.

⁶⁷ *Id.* ¶¶ 7–10, 14, 19–20, 24, 29–31, 35, 37, 40, 42–48, 50–53, 55.

information in the adjudicatory record of this proceeding, provides a sufficient basis for the agency's "fully informed and well-considered decision" on Powertech's application for the Dewey-Burdock project.⁶⁸ Accordingly, the Board should find that the Staff is entitled to judgment as a matter of law on Contention 1A.

I. The Staff's Selected Approach for Obtaining Additional Information on Lakota Sioux Cultural Resources Was Reasonable

In LBP-17-9, the Board found that there remained a genuine issue of material fact with respect to the reasonableness of the methodology the Staff had selected to obtain additional information on sites of historic, cultural, and religious significance to the Lakota Sioux Tribes.⁶⁹ The Board identified four concerns raised by the Oglala Sioux Tribe as presenting a significant material dispute concerning what a reasonable methodology to obtain this information should entail.⁷⁰ Following the Board's decision in LBP-17-9, the Staff reasonably and transparently engaged all of the parties, and particularly the Tribe, on the selection and implementation of a new cultural resources survey approach that responded to the material concerns of the Tribe.⁷¹ The Tribe represented to the Staff and the Board that this selected approach was reasonable and responded to its concerns, and committed to participating in and supporting its implementation.⁷² The Tribe's subsequent constructive rejection of the selected approach by its eleventh-hour proposal of a significantly different, fundamentally incompatible approach, does not establish a material dispute with the reasonableness of the selected approach.

⁶⁸ See *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

⁶⁹ *Powertech*, LBP-17-9, 86 NRC at 167, 198.

⁷⁰ *Id.*; Statement of Material Facts ¶¶ 4–5.

⁷¹ Statement of Material Facts ¶¶ 6–44, 46–50, 53–60.

⁷² *Id.* ¶¶ 20–21, 24–27, 38–39, 41, 43; see also *id.* ¶ 17.

A. The Selected Approach Responded to the Material Concerns Raised by the Oglala Sioux Tribe Regarding a Survey Methodology

The selected approach consisted of a methodology for obtaining information on Lakota Sioux cultural resources that responded to the material concerns raised by the Oglala Sioux Tribe. In LBP-17-9, the Board observed that a May 31, 2017, letter from the Oglala Sioux Tribe to the Staff

provided significant discussion as to the types of methodologies that the Tribe expected would be included in any NRC Staff courses of action to remedy the NEPA and NHPA violations, including references to the desire to engage a contractor to facilitate and coordinate a survey, with involvement of the other Sioux tribes The Tribe also described its strong desire to involve elders in the process, as well as the need for tribal members to carefully consider the survey findings and allow for subsequent trips to the site to ensure an accurate assessment.⁷³

Accordingly, the Board found that the material issues in dispute with respect to the reasonableness of the methodology consisted of the Tribe's "challenge to (1) the scientific integrity and lack of a trained surveyor or ethnographer coordinating the survey; (2) the number of tribal members invited to participate in the survey; (3) the length of time provided for the survey; and (4) the tribes invited to participate in the survey."⁷⁴ In February 2018, the Oglala Sioux Tribe reaffirmed that the "essential components" of a survey methodology were "having a qualified contractor oversee and manage the process, providing opportunities for engagement of tribal elders and councils, allowing time and opportunity for repeat visits to the site spaced out over time, as well as the ability to review and comment on the resulting reports."⁷⁵

In response to the concerns identified by the Board in LBP-17-9, the Staff moved promptly to select a new approach for obtaining information on Lakota Sioux cultural

⁷³ *Powertech*, LBP-17-9, 86 NRC at 182.

⁷⁴ *Id.* at 198.

⁷⁵ Statement of Material Facts ¶ 26.

resources.⁷⁶ In December 2017, the Staff proposed an approach to obtain information on Lakota Sioux cultural resources that was intended to respond to these material concerns while reasonably and transparently factoring in considerations of schedule and cost.⁷⁷ Over several months, the Staff sought the input of the parties on the proposed approach and discussed this input with the parties and the Board.⁷⁸

On March 16, 2018, after considering this input, the Staff selected an approach that responded to the material concerns of the Tribe.⁷⁹ Among other features, the selected approach responded to these concerns by: (1) providing for the involvement of the Tribes identified by the Oglala Sioux Tribe as necessary to the survey effort; (2) providing opportunities for the involvement of the elders of the invited Tribes; (3) providing for twice as much time and iterative opportunities to survey the Dewey-Burdock site; and (4) using a qualified contractor to implement the approach, including working with the Tribes to coordinate the tribal field survey.⁸⁰ Thus, the selected approach encompassed all of the “essential components” that the Tribe stated a survey methodology must comprise.⁸¹

1. *The Selected Approach Provided for the Involvement of the Tribes Identified by the Oglala Sioux Tribe as Necessary to the Survey Effort*

The selected approach provided for the involvement of the Sioux Tribes identified by the Oglala Sioux Tribe as necessary to the survey effort, including the Lakota Sioux Tribes.⁸² In a May 31, 2017, letter to the Staff, the Tribe stated that “there must be an effort to coordinate the

⁷⁶ *Id.* ¶¶ 5–16.

⁷⁷ *Id.* ¶¶ 5–26.

⁷⁸ *Id.* ¶¶ 8–11, 14–17, 20–27.

⁷⁹ *Id.* ¶¶ 26, 28–37.

⁸⁰ *Id.* ¶¶ 26, 30–31.

⁸¹ *See id.* ¶ 26.

⁸² *Id.* ¶¶ 26, 31, 35, 44–46.

several different Lakota Sioux Tribes before designing and conducting a cultural resources survey,” and that these Tribes must be “included at the earliest stages in order to be competent in its analysis of Lakota Sioux cultural resources.”⁸³ When the Staff provided the Tribe with its proposed approach in December 2017, the Staff requested the Tribe’s assistance with confirming the identity of the remaining Lakota Sioux Tribes potentially impacted by the Dewey-Burdock project.⁸⁴ While awaiting this input from the Tribe, the Staff provided a copy of the proposed approach to the Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, and Rosebud Sioux Tribe.⁸⁵ The Oglala Sioux Tribe committed to coordinating the engagement of the affected Tribes in the Staff’s approach.⁸⁶ The Tribe also informed the Board that it had “been in touch with the other tribes and circulated” the Staff’s letter communicating the proposed approach.⁸⁷

After the Staff again requested that the Tribe identify the Tribes that it viewed as necessary to the survey effort,⁸⁸ the Tribe confirmed for the Staff that the other Tribes the Staff should involve in the approach included the Standing Rock Sioux Tribe, Rosebud Sioux Tribe, Cheyenne River Sioux Tribe, Yankton Sioux Tribe, Crow Creek Sioux Tribe, and Flandreau

⁸³ *Id.* ¶ 3.

⁸⁴ *Id.* ¶ 11.

⁸⁵ *Id.* ¶ 13.

⁸⁶ *Id.* ¶ 24.

⁸⁷ *Id.*

⁸⁸ *Id.* ¶ 25.

Santee Sioux Tribe.⁸⁹ Once these Tribes were identified, the Staff copied each of these Tribes on its correspondence with the Oglala Sioux Tribe.⁹⁰

The Staff invited these Tribes, as well as the Lower Brule Sioux Tribe, to participate in the selected approach.⁹¹ In the weeks preceding the first phase of the tribal field survey effort—to take place in June 2018—the Staff reached out to these Tribes by letter, email, and telephone to obtain their input and facilitate their involvement in the selected approach.⁹² Ultimately, only the Oglala Sioux Tribe and Rosebud Sioux Tribe elected to participate in the webinar and teleconference to discuss the tribal field survey effort,⁹³ and only the Oglala Sioux Tribe expressed any intent to participate in the tribal field survey effort itself.⁹⁴ Through the selected approach, the Staff made a reasonable effort to afford the Tribes another opportunity to participate in a tribal field survey of the Dewey-Burdock site; the Staff was not required to (and could not in any event) compel the Tribes' participation in the approach.⁹⁵

⁸⁹ *Id.* ¶ 26. The Oglala Sioux Tribe, Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, Rosebud Sioux Tribe, and Lower Brule Sioux Tribe, are Lakota Sioux Tribes. In its information to the Staff, the Oglala Sioux Tribe also identified two Western Dakota Sioux Tribes—the Yankton Sioux Tribe and the Crow Creek Sioux Tribe—and one Eastern Dakota Sioux Tribe—the Flandreau Santee Sioux Tribe—as necessary to the survey effort. *Id.* Although it is undisputed that the focus of this contention is on the cultural resources of the Lakota Sioux Tribes, the Staff invited these Dakota Sioux Tribes to participate in the selected approach on the same footing as the Lakota Sioux Tribes. *Id.* ¶¶ 44, 46–47, 50, 52–53, 55.

⁹⁰ *Id.* ¶ 35.

⁹¹ *Id.* ¶¶ 43–48, 50–53, 55. In early May 2018, the Staff identified the Lower Brule Sioux Tribe as a Lakota Sioux Tribe that the Oglala Sioux Tribe had not identified in its information to the Staff. *See id.* ¶¶ 26, 45. Once the omission was identified, the Staff extended an invitation to the Lower Brule Sioux Tribe to participate in the selected approach. *Id.* ¶ 45.

⁹² *Id.* ¶¶ 43–48, 53–55.

⁹³ *Id.* ¶ 47.

⁹⁴ *See id.* ¶¶ 47–59. The Cheyenne River Sioux Tribe informed the Staff that it did not intend to participate in the selected approach. *Id.* ¶ 51. As the Oglala Sioux Tribe observed during the parties' discussions on the proposed approach, the Tribes "are allowed their own decision on whether or not to be involved in the survey, or the NEPA process more generally." *Id.* ¶ 26.

⁹⁵ Under NEPA, an agency need only make reasonable efforts to acquire missing information. *See* 40 C.F.R. § 1502.22; *Town of Winthrop v. FAA*, 535 F.3d 1 (1st Cir. 2008); *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC 202,

2. *The Selected Approach Provided Opportunities for the Involvement of Tribal Elders*

The selected approach provided opportunities for the involvement of the elders of the invited Tribes in the implementation of the approach. In its May 31, 2017, letter to the Staff, the Oglala Sioux Tribe stated that the Staff's methodology and timing needed to account for "the ability to use tribal elders and other experts as resources in a coordinated fashion with other tribal historic preservation offices."⁹⁶ Under the selected approach, the Staff planned to request oral history interviews with the tribal elders of the invited Tribes to gather information regarding resources of significance to their respective Tribe that could be impacted by the Dewey-Burdock project.⁹⁷ The Staff clarified that the selected approach allowed for the participation of any number of tribal members in the tribal field survey and, while the licensee committed to reimbursement of lodging and per diem expenses for up to three tribal representatives per Tribe, the licensee also obligated \$10,000 to each participating Tribe to be used at the Tribe's discretion.⁹⁸ The selected approach provided opportunities for the Tribes to engage their tribal elders and councils in the tribal field survey by structuring the field survey to offer a second opportunity to visit the Dewey-Burdock site and by spacing out the two phases of the tribal field

208 (2010); *see also Powertech*, CLI-18-7, 88 NRC at __, __ (slip. op. at 1 n.1) (Chairman Svinicki, Additional Views) (citing these authorities).

⁹⁶ Statement of Material Facts ¶ 3.

⁹⁷ *Id.* ¶¶ 7, 17, 30.

⁹⁸ The selected approach, consistent with the preliminary version of the approach proposed in December 2017, explained that Lakota Sioux Tribes who did not participate in the April 2013 tribal field survey would be invited to participate in a field survey with up to three tribal representatives per Tribe. *Id.* ¶¶ 8, 30. Accordingly, the selected approach expanded the number of tribal members invited to participate in the field survey from a total of three, as provided for in the Staff's April 2017 approach, to a total of 21, because seven Tribes invited by the Staff to participate in the selected approach had not yet surveyed the Dewey-Burdock site. *Id.* ¶¶ 30–31, 45. Despite the inclusion of these provisions regarding the number of tribal participants and associated reimbursement to the Tribes, during discussions with the Board on the proposed and selected approach, the Oglala Sioux Tribe did not raise objections to this aspect of the approach. The Staff later clarified that the participating Tribes would be permitted to bring any number of tribal members to participate in the field survey, and that the limitation of three representatives per Tribe was only for the purposes of reimbursement. *Id.* ¶ 49.

survey to allow for consultation and consideration of the resulting information.⁹⁹ The selected approach also provided opportunities for the Tribes to review and comment on the documentation resulting from the tribal field survey and oral history interviews.¹⁰⁰

3. *The Selected Approach Provided for Twice as Much Time and Iterative Opportunities to Conduct the Tribal Field Survey*

The selected approach provided twice the length of time to survey the Dewey-Burdock site as the Staff's previous approach and was structured to allow for iterative opportunities for the Tribes to survey the site. In its May 31, 2017, letter to the Staff, the Oglala Sioux Tribe cited the testimony of its former Tribal Historic Preservation Officer in the *Crow Butte* license renewal proceeding for the claim that a tribal field survey should take place in different seasons and when ground visibility is best.¹⁰¹ Under the selected approach, the participating Tribes would have two opportunities of approximately two weeks in length to survey the Dewey-Burdock site, twice the length of time provided for in the Staff's previous survey approach.¹⁰² The two phases of the tribal field survey were scheduled to take place in June 2018 and September 2018,¹⁰³ allowing the Tribes to survey the Dewey-Burdock site in different times of the year while avoiding the months in which ground visibility may be more limited by weather conditions. In discussions with the Board and parties regarding the approach, the Staff emphasized the need to adhere to the schedule for its implementation in order to avoid impacts to this essential feature of the approach.¹⁰⁴ The Tribe informed the Staff and the Board that it was comfortable

⁹⁹ *Id.* ¶¶ 6–7, 10, 12, 17, 21–22, 26, 30, 41–42.

¹⁰⁰ *Id.* ¶ 30.

¹⁰¹ *Id.* ¶ 3.

¹⁰² *Id.* ¶¶ 7–8, 25, 30, 54.

¹⁰³ *Id.* ¶¶ 30, 44, 53–55.

¹⁰⁴ *Id.* ¶¶ 38, 41; *see also id.* ¶¶ 26, 33.

with the schedule for implementation of the selected approach and that its dates appeared achievable.¹⁰⁵

4. *The Selected Approach Provided for the Use of a Qualified Contractor to Support the Approach*

The selected approach included securing a qualified contractor to assist the Staff in implementation of the approach.¹⁰⁶ In its May 31, 2017, letter to the Staff, the Oglala Sioux Tribe stated that it “strongly maintains that the best manner to conduct a proper survey is to involve a contractor(s) with the necessary experience, training, and cultural knowledge to carry out and facilitate the survey.”¹⁰⁷ In support of this assertion, the Tribe cited the testimony of a Staff expert witness in the *Crow Butte* license renewal proceeding, who testified that the “best approach” for a tribal field survey involved the use of a facilitator to “provide logistics support, documentation, recording support, [and] report preparation, if that were necessary.”¹⁰⁸ The selected approach provided for the involvement of a qualified contractor to facilitate the tribal field survey, to conduct oral history interviews of tribal elders, and to document findings and supporting information, as appropriate, to be considered in the development of the survey report.¹⁰⁹

As it began to implement the selected approach, the Staff secured a contractor to carry out these activities.¹¹⁰ Before the implementation of the selected approach was cut short, the contractor developed for discussion with the invited Tribes two options for potential

¹⁰⁵ *Id.* ¶ 41.

¹⁰⁶ *Id.* ¶¶ 7, 30, 44.

¹⁰⁷ *Id.* ¶ 3.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* ¶¶ 7, 30.

¹¹⁰ *Id.* ¶ 44.

methodologies for conducting the tribal field survey effort;¹¹¹ discussed with, and sought input from, the Oglala Sioux Tribe and Rosebud Sioux Tribe on a methodology for the tribal field survey;¹¹² discussed with, and sought input from, the Oglala Sioux Tribe and Rosebud Sioux Tribe on how findings from the survey would be documented;¹¹³ proposed an initial plan of work to the invited Tribes comprising an initial methodology for conducting the tribal field survey;¹¹⁴ and met with the Oglala Sioux Tribe during the first week of the June tribal field survey to further discuss the Tribe's input on a methodology for the field survey.¹¹⁵ The Oglala Sioux Tribe requested and was provided the qualifications of the principal contractors supporting the selected approach.¹¹⁶ The Tribe did not object to working with these contractors.¹¹⁷

In sum, the selected approach consisted of those elements described by the Tribe as the “essential components” of a methodology for obtaining information on Lakota Sioux cultural resources and responded to the material concerns raised by the Tribe regarding what such a methodology should entail. Accordingly, there no longer exists a genuine dispute on a material issue of fact with respect to the reasonableness of the Staff's methodology for obtaining additional information on Lakota Sioux cultural resources.

¹¹¹ *Id.* ¶ 46.

¹¹² *Id.* ¶¶ 47–48, 50, 58. The Oglala Sioux Tribe and Rosebud Sioux Tribe were the only Tribes who accepted the Staff's invitation to participate in the webinar teleconferences to discuss and establish a methodology for conducting the tribal field survey. *Id.* ¶ 47.

¹¹³ *Id.* ¶ 48.

¹¹⁴ *Id.* ¶ 50.

¹¹⁵ *Id.* ¶¶ 58–60.

¹¹⁶ *Id.* ¶ 56–57.

¹¹⁷ *See id.* ¶¶ 58–60 (Tribe met repeatedly with Staff's contractor); *see also* ¶¶ 59, 62 (Tribe's proposal involved using Staff's contractor for specific aspects of the approach). In fact, one of the principal contractors was the very same Staff expert witness in the *Crow Butte* license renewal proceeding whose testimony the Oglala Sioux Tribe cited as authority for its views concerning the essential elements of a survey approach. *E.g., compare id.* ¶ 3 with *id.* ¶¶ 58–60.

B. The Oglala Sioux Tribe Acknowledged the Reasonableness of the Selected Approach

The reasonableness of the Staff's methodology for obtaining additional information on Lakota Sioux cultural resources is underscored by the Tribe's representations to the Staff and to the Board—during the development of the approach and after its selection—that the Tribe viewed the approach as reasonable and intended to both participate in it and facilitate the participation of other Tribes.

1. *The Tribe Acknowledged that the Selected Approach Was a Reasonable Methodology for Obtaining the Information Sought*

On December 6, 2017, the Staff provided the proposed approach to the Oglala Sioux Tribe for its review and comment.¹¹⁸ In a teleconference with the Board and parties on December 12, 2017, the Oglala Sioux Tribe stated that the components of the Staff's proposed approach, including "meeting with the tribal councils, coordinating oral histories[,] and involving elders" were "welcome and consistent with what the Tribe had sought" in its May 31, 2017, letter to the Staff.¹¹⁹ In a January 19, 2018, letter, the Tribe informed the Staff that the proposed approach provided a reasonable likelihood of satisfying NEPA and resolving the Tribe's contention.¹²⁰ The Tribe stated that "the components that make up the basic structure of the plan are realistic, logical, and coincide well with the suggestions put forward by the Tribe and the expert testimony provided by NRC Staff and the Tribe in both the Crow Butte and Dewey-Burdock proceedings."¹²¹ The Tribe spoke approvingly of the essential features of the proposed approach, including the protocols for the tribal field survey, the involvement of tribal elders and

¹¹⁸ *Id.* ¶¶ 6–12.

¹¹⁹ *Id.* ¶ 17.

¹²⁰ *Id.* ¶ 21.

¹²¹ *Id.*

councils of multiple Tribes in the approach, and the involvement of an outside contractor to facilitate the tribal field survey.¹²²

In January and February 2018, the Staff continued to seek the input of the Tribe on the proposed approach.¹²³ In the course of discussions among the parties and with the Board on the proposed approach, the Tribe stated that “the components that have been put forth align with the issues [the Tribe] raised and [has] been raising for some time,” and described its “positive reaction” toward the proposal, noting the proposal’s “consistency with [the May 31, 2017] letter [from the Tribe].”¹²⁴ The Tribe also stated that it supported the timeframe set forth in the proposed approach.¹²⁵

In response to the Staff’s March 16, 2018, letter informing the Tribe of its selection of the approach, the Tribe again stated that the approach appeared reasonable.¹²⁶ In discussions with the Board and parties on the selected approach, the Tribe stated that the selected approach reflected “a substantial similarity to the previous [December 2017] proposal” and that the dates for implementing the selected approach were “generally consistent with the previous proposal.”¹²⁷ The Tribe expressed that it had been encouraged by the Staff’s proposed and selected approach, noting the Staff’s capacity to listen to the Tribe’s concerns and incorporate most of them.¹²⁸ The Tribe stated that the selected approach was “a reasonable one.”¹²⁹

¹²² *Id.* The Consolidated Intervenor provided similar feedback on the approach to the Staff. *Id.* ¶ 22.

¹²³ *Id.* ¶¶ 25–26.

¹²⁴ *Id.* ¶ 24.

¹²⁵ *Id.* ¶ 26.

¹²⁶ *Id.* ¶ 39.

¹²⁷ *Id.* ¶ 38.

¹²⁸ *Id.* ¶ 41.

¹²⁹ *Id.*

2. *The Tribe's Off-Statement Commitment to Participate in and Facilitate the Selected Approach Further Buttressed the Approach's Reasonableness*

Further, in discussions among the parties and with the Board, the Tribe expressed its commitment to participating in the approach and facilitating its implementation.¹³⁰ The Tribe committed to coordinating the input and participation of other Tribes in the approach.¹³¹ For example, the Tribe stated that, in order to facilitate a timely and efficient process for meeting with tribal councils, the Tribe would work diligently to facilitate engagement with the identified Tribes to minimize Staff and consultant travel time.¹³² The Tribe also represented that it had already reached out to the Standing Rock Sioux Tribe and Rosebud Sioux Tribe and secured their interest in participating in the approach.¹³³ In a teleconference with the Board and parties after the Staff's final selection of the approach, the Tribe affirmed its commitment to conduct outreach to the other Sioux Tribes regarding the approach.¹³⁴ The Tribe stated that the timeframe for the selected approach appeared achievable.¹³⁵ The Tribe further stated that its concerns regarding the specific terms of reimbursement for participating in the approach and the Staff's process for selecting a contractor to support the selected approach—raised for the first time as potential impediments to the Tribe's participation in the approach in March 2018—would not, in fact, prevent the Tribe from participating in the approach.¹³⁶ Further, after notifying

¹³⁰ *Id.* ¶¶ 24–27, 38–39, 41.

¹³¹ *Id.* ¶¶ 24, 38.

¹³² *Id.* ¶ 25.

¹³³ *Id.* ¶ 26.

¹³⁴ *Id.* ¶ 38.

¹³⁵ *Id.* ¶ 41.

¹³⁶ *Id.* In the course of the Staff's discussions with the Oglala Sioux Tribe regarding the selected approach, the Tribe raised additional concerns regarding the Tribe's involvement in the selection of a qualified NRC contractor to effectuate the approach and the amount and terms of reimbursement for the Tribe's participation in the approach. *Id.* ¶¶ 26, 39. The Staff informed the Tribe that the NRC was precluded by law from allowing the Tribe to participate in the development of the statement of work or the selection of the contractor for the approach. *Id.* ¶ 41. Regarding the amount of reimbursement provided

the Staff of changes in the Tribal Historic Preservation Office in mid-April, the Tribe assured the Staff that its position on the selected approach had not changed and that it looked forward to participating in the upcoming efforts.¹³⁷

In sum, the Oglala Sioux Tribe repeatedly represented that the selected approach consisted of a methodology for obtaining additional information on Lakota Sioux cultural resources that responded to the material concerns raised by the Tribe. And by its oft-stated commitment to participate in the approach and facilitate the participation of the other Tribes, it further acknowledged that the approach was a reasonable methodology for obtaining this information. While the Tribe raised additional concerns regarding its involvement in the selection of the Staff's contractor and the amount and terms of reimbursement for its participation in the approach, these concerns were addressed by the Staff and Powertech, respectively, and did not prevent the Tribe from participating in the selected approach.¹³⁸ Moreover, the Tribe provided every indication of participating in the selected approach until its abrupt proposal—during the first week of the June 2018 tribal field survey effort—of its own cultural resources survey approach which was fundamentally incompatible with the implementation of the selected approach. Accordingly, the Tribe cannot show the existence of a genuine dispute on a material issue of fact with respect to the reasonableness of the Staff's methodology for obtaining additional information on Lakota Sioux cultural resources.

for participation in the approach, the Tribe stated that it anticipated “that an amount on the order of what was proposed previously would be appropriate.” *Id.* ¶ 26. On April 11, 2018, Powertech committed to providing to each of the participating Tribes reimbursement of an amount consistent with what it had previously proposed. *Compare id.* ¶ 8 with *id.* ¶ 42 (offering \$136.00 per day for lodging and \$59.00 per day for meals and incidental expenses for each tribal representative; \$0.535 per mile for round trips to and from Edgemont, South Dakota; and a \$10,000 honorarium to each participating Tribe to be used at the Tribe's discretion).

¹³⁷ *Id.* ¶ 43.

¹³⁸ See *id.* ¶ 41; see also *id.* ¶¶ 47–49, 53–58 (engaging with the Staff on matters related to implementation of the selected approach, including a tribal field survey methodology, documentation of tribal field survey information, and logistics for activities related to conducting the tribal field survey).

C. Despite the Acknowledged Reasonableness of the Selected Approach, the Tribe Constructively Rejected That Approach

The Staff transparently engaged the Tribe at every stage of the development of the selected approach, and the Tribe, in turn, consistently provided input indicating its approval of the approach, acknowledgment of its reasonableness, and commitment to participate and assist in its implementation. Nevertheless, during the first week of the June field survey effort, the Tribe constructively rejected the selected approach when it proposed its own cultural resources survey approach that was objectively incompatible with the selected approach and that even greatly exceeded, in scope, timeframe, and cost, an earlier proposal that the Tribe knew the Staff could not accept.¹³⁹

At the request of the Tribe, the Staff continued discussions with the Tribe regarding a methodology for the June tribal field survey effort into the first week of the survey.¹⁴⁰ In the midst of these discussions, the Tribe provided to the Staff a cultural resources survey proposal that was, by its terms, objectively and fundamentally incompatible with the selected approach. The Tribe's proposal contemplated a range of activities, a timeframe, and a cost to implement that would far exceed the scope of the selected approach. The Tribe projected that the implementation of its proposal would cost millions of dollars¹⁴¹—in total, nearly three times the cost of an approach previously described by the Board as “patently unreasonable”—the Makoche Wowapi proposal.¹⁴² The Makoche Wowapi proposal was estimated to cost

¹³⁹ See *Powertech*, LBP-17-9, 86 NRC at 203–04 & n.214 (citing Transcript of Proceedings (Tr.) at 44–45).

¹⁴⁰ Statement of Material Facts ¶¶ 53–55, 58.

¹⁴¹ *Id.* ¶¶ 59, 62. Further, the Tribe's cost estimate accounted for neither the costs of the Staff and Staff contractor time nor for the involvement of other Tribes.

¹⁴² *Powertech*, LBP-15-16, 81 NRC at 656-57 & n.229 (citing Tr. at 807, 810) (referring in part to “the funds requested to collect tribal cultural information” associated with the Makoche Wowapi proposal and comparable survey efforts); see also *Powertech*, LBP-17-9, 86 NRC at 177 & n.33 (stating “the Board [in LBP-15-16] found that the cost of the survey proposal, estimated at close to \$1 million . . . was unreasonable.”).

approximately \$818,000,¹⁴³ and would have entailed eight weeks of field work over two sessions to survey just a portion of the Dewey-Burdock site.¹⁴⁴ The Tribe's proposal called for seven times as many weeks of field work as the Makoche Wowapi proposal, as well as a year to conduct oral history interviews of tribal elders, the involvement of several dozen members of the Tribe, and the examination of areas far outside the licensed area of the Dewey-Burdock project.¹⁴⁵

Moreover, even the Tribe's ultimatum to the Staff—that the Staff must either accept the Tribe's proposal or develop a different approach that incorporates as much of the Tribe's proposal as resources will allow¹⁴⁶—was incompatible with the parameters of the selected approach. Despite its representations that its proposal was only intended for discussion and an “acceptable” approach could be negotiated “within the timing and budget restraints of the March 2018 approach,”¹⁴⁷ the Tribe could not have reasonably expected that the negotiation and selection of yet another approach could take place within the timeframe for implementing the selected approach, given the extensive consultation undertaken to arrive at an agreement among the parties to support and participate in the selected approach.¹⁴⁸ Accordingly, the Tribe cannot plausibly assert that its proposal was consistent with effectuating the selected approach.

Finally, for essentially the same reasons, the Tribe cannot demonstrate that its proposal was a reasonable response to the Tribe's perceived concerns regarding a methodology for the June tribal field survey. The Tribe stated that it was compelled to offer its proposal because the

¹⁴³ *Powertech*, LBP-17-9, 86 NRC at 177 n.33.

¹⁴⁴ Ex. BRD-022-00-BD01 at 1.

¹⁴⁵ Statement of Material Facts ¶¶ 59, 62.

¹⁴⁶ *Id.* ¶ 62.

¹⁴⁷ *Id.* ¶ 63.

¹⁴⁸ See *id.* ¶¶ 6–43.

Staff “never proposed any cultural resource survey methodology” and so “development of a survey methodology was necessitated by the NRC Staff’s continued reliance on an informal open site survey instead of a methodologically sound survey developed by qualified contractors, with the Tribe’s input.”¹⁴⁹ The absence of factual support for this claim, however, is apparent from the undisputed facts summarized above regarding the parties’ negotiations over many months to develop the selected approach. The Staff provided potential options for methodologies for discussion with the invited Tribes, followed by a proposed plan of work consisting of an initial methodology for conducting the June tribal field survey, and repeatedly sought the Tribe’s input on the methodology for the field survey.¹⁵⁰ The Tribe’s unsupported dismissal of the Staff’s efforts to establish a methodology with the invited Tribes for the June tribal field survey effort as a mere offer of an open-site survey approach¹⁵¹ is insufficient to demonstrate a material dispute with either the reasonableness of the Staff’s efforts to obtain the Tribe’s agreement to a methodology for conducting the June tribal field survey, or with the reasonableness of the selected approach as a whole. Under NEPA, the Staff is not required to use “the best scientific methodology,”¹⁵² but can “select [its] own methodology so long as that methodology is reasonable.”¹⁵³ As repeatedly acknowledged by the Tribe, the Staff selected a reasonable methodology for obtaining additional information on Lakota Sioux cultural resources.¹⁵⁴ Further, the Tribe’s justification for its proposal is belied by the terms of the

¹⁴⁹ *Id.* ¶ 63.

¹⁵⁰ *Id.* ¶¶ 46–48, 50, 52–55, 58; *see also id.* ¶¶ 9, 26 (Staff solicited Tribe’s input on its preferred field survey methodology as early as December 2017). Had the Staff not sought to obtain the Tribes’ input on and agreement to a methodology for conducting the tribal field survey, the Staff would have been open to charges that it was attempting to impose a methodology on the Tribes without their consent.

¹⁵¹ *Id.* ¶ 63.

¹⁵² *Pilgrim*, CLI-10-11, 71 NRC at 315 (citing *Hells Canyon*, 227 F.3d at 1185).

¹⁵³ *Id.* at 316 (quoting *Winthrop*, 535 F.3d at 13).

¹⁵⁴ To the extent that the Tribe intends to now argue that its 10-meter transect-based approach is the “methodologically sound survey” approach necessary to its participation in a tribal field survey effort, *see*

proposal itself: contrary to its characterization as a focused and negotiable response to the perceived concerns regarding the narrow details of a methodology for the June tribal field survey, the Tribe's proposal was unambiguously intended to substitute for the selected approach in its entirety. The elements of the Tribe's proposal not only encompassed all of the elements described in the selected approach, but greatly exceeded them in cost, timeframe, and scope. Accordingly, the Tribe cannot show that its proposal is anything other than a constructive rejection of the selected approach.

In sum, the Tribe's unforeseen, eleventh-hour proposal of a new approach that was incompatible with the implementation of the selected approach and greatly exceeded, in cost, timeframe, and scope, an earlier proposal previously described as "patently unreasonable" by the Board and rejected by the Staff, can only be viewed as a constructive rejection of the selected approach. The Tribe's constructive rejection of the selected approach precluded the Staff from fully implementing it because the Staff's ability to do so successfully depended upon the participation of the Tribe¹⁵⁵ and close adherence to the timeframe for its implementation,¹⁵⁶ both facts of which the Tribe was well aware. Under the circumstances, where the elements of

OST July 16, 2018 Response at 2, the Tribe has had numerous opportunities to raise this concern as a material issue in this proceeding, but did not do so. For example, when the Staff issued the proposed approach to the Tribe in December 2017, the Staff specifically requested the Tribe's input on a preferred survey methodology, specifically identifying "conventional transect" to be one such methodology upon which the Staff requested comment. Statement of Material Facts ¶ 9. Instead, the Tribe affirmatively elected to defer any discussion of a methodology for the tribal field survey element of the approach until the week the survey was actually scheduled to take place, and, having done so, continued to characterize the selected approach as reasonable and committed to participating in it. See, e.g., *id.* ¶¶ 21, 26, 39. Having declined to timely raise a concern regarding any overarching prerequisites for a "methodologically sound" tribal field survey methodology, and having acknowledged that the selected approach was reasonable notwithstanding the absence of an agreed-upon tribal field survey methodology, the Tribe cannot demonstrate that any such concern is now material.

¹⁵⁵ During the development of the selected approach, the Oglala Sioux Tribe committed to coordinating the participation of the other Tribes necessary to the effort to identify potentially affected Lakota Sioux cultural resources. *Id.* ¶¶ 24, 38. The Tribe also committed to facilitating the meetings between the Staff and the tribal councils of the invited Tribes. *Id.* ¶¶ 21, 24–25; see also *id.* ¶¶ 10, 44 (as element of approach, Staff transparently requested Tribe's assistance in facilitating its implementation with the invited Tribes).

¹⁵⁶ *Id.* ¶ 33, 38–39, 41.

the selected approach were developed specifically in response to the Tribe's self-defined essential concerns, and the manner in which the Staff incorporated those elements into the selected approach was transparently socialized among the parties, the Tribe's last-minute proposal of its own, incompatible approach, cannot represent a material dispute with the reasonableness of the selected approach.

II. The Staff's FSEIS, as Supplemented by Information in the Record of This Proceeding, Satisfies NEPA

In LBP-15-16 and LBP-17-9, the Board stated that until a study or survey of Lakota Sioux cultural resources is conducted, "complete" information on those resources is missing from the FSEIS.¹⁵⁷ And in LBP-17-9, the Board stated that "if the NRC Staff chooses a methodology that does not include complete information about adverse effects on the Tribe's cultural resources, the NRC Staff would need to include an explanation that satisfies the requirements of 40 C.F.R. § 1502.22."¹⁵⁸ The Commission has stated that the Staff can address a deficiency in an environmental review document "if it states that fact, explains how the missing information is relevant, sets forth the existing information, and evaluates the environmental impacts to the best of the agency's ability."¹⁵⁹

Although the Staff's selected approach was reasonable, the Staff was precluded from fully implementing it by the Tribe's constructive rejection of the approach. As such, the information that the Board found to be inadequate in its merits ruling on Contention 1A is unavailable; it is not reasonably feasible for the Staff to obtain the information from the Tribe, as the Board contemplated. Therefore, the environmental record of decision in this matter does not include any new information on the presence of sites of historic, cultural, and religious

¹⁵⁷ *Powertech*, LBP-17-9, 86 NRC at 200 (citing *Powertech*, LBP-15-16, 81 NRC at 655).

¹⁵⁸ *Id.* at 200.

¹⁵⁹ *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 235–36 (2007).

significance to the Lakota Sioux Tribes at the Dewey-Burdock site;¹⁶⁰ any changes to the discussion of potential adverse effects from the Dewey-Burdock project on sites of historic, cultural, and religious significance to the Lakota Sioux Tribes; or any changes to the discussion of potential mitigation measures for such sites.¹⁶¹ Nonetheless, as discussed below, the information in the FSEIS and in the adjudicatory record provides sufficient information to satisfy the requirements of 40 C.F.R. § 1502.22.¹⁶²

A. Additional Information Would Not Materially Affect Staff's Evaluation of Impacts to Cultural Resources

The information on Lakota Sioux cultural resources that may have resulted from a tribal survey of the Dewey-Burdock site would have been relevant to “evaluating reasonably foreseeable significant adverse impacts on the human environment”¹⁶³ insofar as the identification of specific cultural resources of significance to the Lakota Sioux Tribes may have enabled the Staff to assess the impacts of the project on those resources and, if appropriate, identify specific mitigation measures for them.¹⁶⁴ Importantly, however, this information would not have materially affected the Staff's determination regarding the adverse impacts to cultural resources. In the FSEIS, the Staff evaluated how the Dewey-Burdock project might affect historic and cultural resources within the area of potential effects¹⁶⁵ and concluded that the

¹⁶⁰ Affidavit of Diana Diaz-Toro Concerning the NRC Staff's Motion for Summary Disposition of Contention 1A (Aug. 17, 2018) (Attachment 2), ¶ 9 [hereinafter Diaz-Toro Affidavit].

¹⁶¹ See *id.*; Statement of Material Facts ¶¶ 64–65, 67 (explaining the Staff's decision to suspend efforts to implement the selected approach).

¹⁶² In an NRC adjudicatory proceeding, even if an EIS is found to be inadequate in certain respects, the inadequacy can be cured through the Board's findings on the information in the adjudicatory record. See *Hydro Res., Inc.* (P.O. Box 15190, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 53 (2001); *La. Energy Servs., L.P.*, LBP-05-13, 61 NRC 385, 404 (2005), *aff'd*, CLI-06-22, 64 NRC 37 (2006); *Vogtle*, LBP-09-7, 69 NRC at 632.

¹⁶³ 40 C.F.R. § 1502.22(b)(2).

¹⁶⁴ Diaz-Toro Affidavit ¶ 8.

¹⁶⁵ Ex. NRC-008-A-2, FSEIS, at 466–86.

potential overall impacts to these resources would be “SMALL to LARGE.”¹⁶⁶ Had the selected approach resulted in the identification of potential impacts to, and mitigation measures for, specific Lakota Sioux cultural resources, this information—at most—might have enabled the Staff to more particularize its assessment of specific cultural resources, including mitigating or avoiding potential impacts to these resources.¹⁶⁷ But because the Staff had already determined that the issuance of the materials license was the preferred alternative even where the potential impacts to cultural resources may be as great as “LARGE,”¹⁶⁸ this additional information simply would not have been material to the Staff’s determination regarding the potential adverse impacts to cultural resources or its ultimate NEPA decision regarding a preferred alternative.

B. The Record Contains a Summary of Existing Relevant Information

The FSEIS for the Dewey-Burdock project evaluates the information about Sioux cultural resources that the Staff was able to obtain without the specific input of the Lakota Sioux Tribes.¹⁶⁹ For example, in Chapter 3 of the FSEIS, the Staff described various types of sites that could have been identified if the Lakota Sioux Tribes provided field survey results.¹⁷⁰ The Staff described the cultural history of the Black Hills with reference to the Lakota Sioux’ connection to the area, including the religious and cultural significance of the Black Hills to the Lakota Sioux.¹⁷¹ In addition, the Staff evaluated in the FSEIS how the Dewey-Burdock project might affect all sites within the area of potential effects, not merely those sites that were eligible

¹⁶⁶ Ex. NRC-008-A-1, FSEIS, at 43-44; Ex. NRC-008-A-2, FSEIS, at 466–86; Diaz-Toro Affidavit ¶ 7.

¹⁶⁷ Diaz-Toro Affidavit ¶ 8.

¹⁶⁸ See Ex. NRC-011, NRC Record of Decision for the Dewey-Burdock Uranium In-Situ Recovery Project (ADAMS Accession No. ML14066A466) (Apr. 8, 2014), at 3; Ex. NRC-008-A-1, FSEIS, at 43-44.

¹⁶⁹ Diaz-Toro Affidavit ¶ 6.

¹⁷⁰ Ex. NRC-008-A-1, FSEIS, at 257–63.

¹⁷¹ *Id.* at 247, 257–59; Diaz-Toro Affidavit ¶ 6.

for listing on the National Register of Historic Places.¹⁷² The Staff presented these impact determinations in the FSEIS, along with its recommended measures to mitigate these impacts.¹⁷³ After the Staff completed its evaluations, it provided its impact assessments and mitigation recommendations to all consulting Tribes for comment—including the Oglala Sioux Tribe—as it had committed to doing when it released the Draft SEIS.¹⁷⁴

In addition, the Staff developed some additional information in the course of the partial implementation of the selected approach. The Staff's contractor prepared a literature review report and provided the report to the Tribes invited to participate in the selected approach as background information for the June tribal field survey effort.¹⁷⁵ The literature review report documented the contractor's review of the existing information on the historic, cultural, and religious resources of significance to the Tribes invited to participate in the selected approach, focusing on information pertaining specifically to the Dewey-Burdock project area and its immediate region.¹⁷⁶ Additionally, during the first week of the June tribal field survey effort, as the Staff met with the Oglala Sioux Tribe at the Tribe's request to discuss a field survey methodology, the Staff's contractor revisited previously identified tribal sites to precisely identify the tribal site coordinates and document basic descriptive information about them.¹⁷⁷ The Staff's contractor also confirmed the presence of a bald eagle's nest on the Dewey-Burdock site¹⁷⁸ and recorded photographs of viewsheds from the Dewey-Burdock site to confirm that no

¹⁷² Ex. NRC-008-A-2, FSEIS, at 466–86; Diaz-Toro Affidavit ¶ 7.

¹⁷³ Ex. NRC-008-A-2, FSEIS, at 474–86; Diaz-Toro Affidavit ¶ 7.

¹⁷⁴ Exs. NRC-058 and NRC-061 through NRC-063.

¹⁷⁵ Statement of Material Facts ¶ 52; Diaz-Toro Affidavit ¶ 8.

¹⁷⁶ Diaz-Toro Affidavit ¶ 8.

¹⁷⁷ Diaz-Toro Affidavit ¶¶ 9–10.

¹⁷⁸ Diaz-Toro Affidavit ¶ 10. The FSEIS assessed the impacts of the Dewey-Burdock project on bald eagle nests located within the boundaries of the Dewey-Burdock site. Ex. NRC-008-A-2, FSEIS, at 394–96, 401–03, 453–55. The presence of a bald eagle nest on the site was noted by the Rosebud Sioux

known place of cultural or religious significance to the Tribes lying beyond the license area boundaries could be seen from within the Dewey-Burdock site.¹⁷⁹ These observations were documented in an additional report from the Staff's contractor to the Staff.¹⁸⁰ These reports, taken together with the FSEIS, reflect the existing relevant scientific evidence regarding the potential impacts of the Dewey-Burdock project on cultural resources.¹⁸¹

C. The FSEIS Evaluates Potential Impacts of Dewey-Burdock Project on Cultural Resources

In the FSEIS, the Staff determined that the overall potential impacts to historic and cultural resources from the Dewey-Burdock project would range from "SMALL to LARGE."¹⁸² The Staff's partial implementation of the selected approach did not result in the identification of new sites of historic, cultural, or religious significance to Lakota Sioux Tribes, or information concerning the significance to the Lakota Sioux Tribes of known tribal sites at the Dewey-Burdock site.¹⁸³ Further, the information described in the literature review report and field observations report developed by the Staff's contractor does not provide a basis for the Staff to alter its evaluation regarding the potential impacts to cultural resources from the Dewey-Burdock project or its conclusion that such impacts would range from "SMALL to LARGE."¹⁸⁴ This is because the information in these reports is not materially different from the information already assessed by the Staff in the FSEIS, and because the reports do not provide any

Tribe's Tribal Historic Preservation Officer during the June 5, 2018 teleconference with the Staff. Statement of Material Facts ¶ 46; Diaz-Toro Affidavit ¶ 10.

¹⁷⁹ Diaz-Toro Affidavit ¶ 10.

¹⁸⁰ Statement of Material Facts at ¶ 66; Diaz-Toro Affidavit at ¶ 10.

¹⁸¹ See 40 C.F.R. § 1502.22(b)(3).

¹⁸² Ex. NRC-008-A-1, FSEIS, at 43-44; Ex. NRC-008-A-2, FSEIS, at 466-86; Diaz-Toro Affidavit ¶ 7.

¹⁸³ Diaz-Toro Affidavit ¶¶ 9, 11.

¹⁸⁴ *Id.* ¶ 11.

additional information about the presence of sites of historic, cultural, and religious significance to the Lakota Sioux Tribes at the Dewey-Burdock project site, or additional information about the significance of known tribal sites to the Lakota Sioux Tribes.¹⁸⁵ Accordingly, the information obtained by the Staff during the partial implementation of the selected approach supplements, but does not materially affect, the Staff's analysis and conclusions in the FSEIS regarding the potential impacts of the Dewey-Burdock project on cultural resources.¹⁸⁶

CONCLUSION

There is no longer a genuine issue as to any material fact with respect to the outstanding issues identified by the Board concerning Contention 1A. The material facts demonstrate that the Staff has taken the requisite "hard look" at cultural resources under NEPA for the Dewey-Burdock project. The Staff's selected approach for obtaining additional information on Lakota Sioux cultural resources responded to the material issues raised by the Oglala Sioux Tribe regarding what such a methodology should entail and, consequently, as the Tribe itself acknowledged, provided a reasonable likelihood of obtaining the additional information at issue. The Staff's partial implementation of the selected approach did not ultimately result in obtaining the additional information sought from the Lakota Sioux Tribes. As a result, it is the Staff's determination that the information is unavailable for purposes of further NEPA review. The long record of this proceeding reflects that further discussions regarding the parameters of a field survey cannot reasonably be expected to prove fruitful. And in any event, the Staff's FSEIS, as

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*; see 40 C.F.R. § 1502.22(b)(4). Further, to the extent that additional information regarding the "significant problems and objections raised by . . . any affected Indian Tribes" is necessary to fully satisfy the Staff's NEPA obligation, see 10 C.F.R. § 51.71(b), the adjudicatory record in this proceeding provides ample information to satisfy this requirement. In an NRC adjudicatory proceeding, even if an EIS is found to be inadequate in certain respects, the inadequacy can be cured through the Board's findings on the information in the adjudicatory record. See *Hydro Res., Inc.* (P.O. Box 15190, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 53 (2001); *La. Energy Servs., L.P.*, LBP-05-13, 61 NRC 385, 404 (2005), *aff'd*, CLI-06-22, 64 NRC 37 (2006); *Vogtle*, LBP-09-7, 69 NRC at 632 (stating that in an NRC adjudicatory proceeding, even if an EIS is found to be inadequate in certain respects, the inadequacy can be cured through the Board's findings on the information in the adjudicatory record).

supplemented by the information in the adjudicatory record of this proceeding, provides a sufficient basis for the agency's "fully informed and well-considered decision" on Powertech's application for the Dewey-Burdock project.¹⁸⁷

Accordingly, the Board should grant the Staff's motion for summary disposition, resolve Contention 1A in favor of the Staff, and terminate this proceeding.¹⁸⁸

Respectfully submitted,

/Signed (electronically) by/
Emily Monteith
Emily Monteith
Counsel for the NRC Staff

/Signed (electronically) by/
Lorraine Baer
Lorraine Baer
Counsel for the NRC Staff

Dated at Chicago, Illinois and Rockville, Maryland
this 17th day of August, 2018

¹⁸⁷ See *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

¹⁸⁸ In accordance with 10 C.F.R. § 2.323(b), counsel for the Staff consulted with counsel for the other parties to obtain their views on this motion. Counsel for Powertech stated that they intend to file a response in support of the Staff's motion. Counsel for the Oglala Sioux Tribe and Counsel for the Consolidated Intervenor both stated that they opposed the motion.

August 17, 2018

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
POWERTECH USA, INC.)	Docket No. 40-9075-MLA
)	
(Dewey-Burdock)	
In Situ Uranium Recovery Facility))	

NRC STAFF'S STATEMENT OF MATERIAL FACTS TO SUPPORT
MOTION FOR SUMMARY DISPOSITION OF CONTENTION 1A

In support of its motion for summary disposition of Contention 1A, the Nuclear Regulatory Commission (NRC) Staff submits this statement of material facts for which there is no genuine issue to be heard. In its accompanying motion, the Staff explains why, based on these facts, the Atomic Safety and Licensing Board should grant summary disposition on Contention 1A as a matter of law.

I. Background to Development of Selected Approach to Address Contention 1A

1. On February 8, 2013, the Staff invited 23 Tribes, including the Oglala Sioux Tribe, to participate in a field survey of the Dewey-Burdock *in situ* uranium recovery (ISR) site in order to identify traditional cultural properties (TCPs) of cultural, historic, or religious significance to them.¹ Between April 2 and May 3, 2013, the Staff facilitated this tribal field survey. While the Oglala Sioux Tribe initially announced its intention to participate in a survey, the Oglala Sioux Tribe withdrew its acceptance in part because the Tribal Council would not be briefed before the survey was scheduled to begin.²
2. On April 14, 2017, the Staff offered the Oglala Sioux Tribe a second opportunity to participate in a field survey of the Dewey-Burdock site.³

¹ Exhibit (Ex.) NRC-068, Email from Haimanot Yilma, Project Manager, Environmental Review Branch, to Tribal Historic Preservation Officers (Feb. 8, 2013) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML13039A336).

² Ex. NRC-148, Letter from Bryan V. Brewer, President, Oglala Sioux Tribe, to Kevin Hsueh, Chief, Environmental Review Branch (Mar. 22, 2013) (ADAMS Accession No. ML13141A362).

³ Letter from Cinthya I. Román, Chief, Environmental Review Branch, to Trina Lone Hill, Tribal Historic Preservation Officer, Oglala Sioux Tribe (Apr. 14, 2017) (ADAMS Accession No. ML17103A500).

3. On May 31, 2017, the Oglala Sioux Tribe rejected the Staff's offered survey opportunity.⁴ The Tribe's letter articulated the following positions:
 - A. The Tribe stated that it "strongly maintains that the best manner to conduct a proper survey is to involve a contractor(s) with the necessary experience, training, and cultural knowledge to carry out and facilitate the survey."⁵ In support of this assertion, the Tribe cited the testimony of a Staff expert witness in the Crow Butte license renewal proceeding, Dr. Paul Nickens, who testified that the "best approach" for a tribal field survey involved the use of a facilitator to "provide logistics support, documentation, recording support, [and] report preparation, if that were necessary."⁶
 - B. The Tribe stated that "there must be an effort to coordinate the several different Lakota Sioux Tribes before designing and conducting a cultural resources survey," and "coordination of a cultural resources survey must include the other Lakota Sioux tribal governments at the earliest stages in order to be competent in its analysis of Lakota Sioux cultural resources."⁷
 - C. The Tribe stated that the Staff's methodology and timing needs to account for "the ability to use tribal elders and other experts as resources in a coordinated fashion with other tribal historic preservation offices."⁸
 - D. The Tribe cited the testimony of its former Tribal Historic Preservation Officer (THPO) in the *Crow Butte* license renewal proceeding for the premise that a tribal field survey should take place in different seasons and when ground visibility is best: ". . . When you're talking about that large of an audience, as far as that many tribes to be involved, to get a good feel or the area, maybe in different season – maybe they want to be out there during different seasons, maybe they want to be out there when the ground visibility is the best"⁹
4. On August 3, 2017, the Staff submitted a motion for summary disposition of Contentions 1A and 1B.¹⁰
5. On October 19, 2017, the Board granted summary disposition as to Contention 1B and denied summary disposition as to Contention 1A.¹¹ In denying summary disposition as to Contention 1A, the Board enumerated four concerns raised by the Oglala Sioux Tribe as establishing a significant material factual dispute as to the reasonableness of the Staff's proposed terms for the April 2017 survey opportunity. Specifically, these concerns were: (1) the scientific integrity and lack of a trained surveyor or ethnographer

⁴ Letter from Trina Lone Hill, Tribal Historic Preservation Officer, Oglala Sioux Tribe, to Cinthya I. Román, Chief, Environmental Review Branch (May 31, 2017) (ADAMS Accession No. ML17152A109) [hereinafter OST May 31 Letter].

⁵ *Id.* at 4.

⁶ *Id.*

⁷ *Id.* at 3–4.

⁸ *Id.* at 8.

⁹ *Id.* at 5–6.

¹⁰ NRC Staff's Motion for Summary Disposition of Contentions 1A and 1B (Aug. 3, 2017) (ADAMS Accession No. ML17215B356).

¹¹ Powertech USA, Inc. (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-17-9, 86 NRC 167, 167 (2017).

coordinating the survey; (2) the number of tribal members invited to participate in the survey; (3) the length of time provided for the survey; and (4) the Tribes invited to participate in the survey.¹²

II. Development of Selected Approach to Address Contention 1A

6. On December 6, 2017, in a letter to the Oglala Sioux Tribe, the Staff proposed a new approach to identify sites of historic, cultural, and religious significance to the Lakota Sioux Tribes and gather information to supplement the Final Supplemental Environmental Impact Statement (FSEIS) for the Dewey-Burdock ISR project.¹³
7. The Staff's proposed approach included the following elements:
 - A. Securing a contractor to facilitate the implementation of the approach;
 - B. Meeting with Tribal Councils or Tribal Leaders of the Lakota Sioux Tribes based on their availability and the timeframe for implementing the proposed approach;
 - C. Reaching out to the Lakota Sioux Tribes to coordinate oral history interviews with Tribal Elders and gather information regarding sites of historic, cultural, or religious significance to their respective Tribe that may be affected by the Dewey-Burdock ISR project;
 - D. Coordinating a field survey at the Dewey-Burdock ISR site including the following elements:
 - i. Inviting the Lakota Sioux Tribes who did not participate in the April 2013 survey of the Dewey-Burdock ISR site, including the Oglala Sioux Tribe, to participate in the survey;
 - ii. A survey period of approximately four weeks in length to be divided in two phases of two weeks each;
 - iii. Potentially occurring during the months of June and August 2018;
 - iv. Covering the entire Dewey-Burdock license area, although tribal representatives would be encouraged to focus their survey efforts on the areas of potential disturbance within the license area;
 - v. Using an NRC contractor to facilitate the survey and document findings and supporting information, as appropriate, to be considered in the development of the survey report;
 - E. Preparing a supplement to the FSEIS for the Dewey-Burdock ISR project describing potential impacts to sites of historic, cultural, or religious significance to the Lakota Sioux Tribes using the information gathered through the field

¹² *Id.* at 196–98.

¹³ Letter from Cinthya I. Román, Chief, Environmental Review Branch, to Trina Lone Hill, Tribal Historic Preservation Officer, Oglala Sioux Tribe (Dec. 6, 2017) (ADAMS Accession No. ML18002A529) [hereinafter OST December 6 Letter].

survey, oral history interviews, and any other information provided by the Tribes.¹⁴

8. In the December 6 letter, the Staff stated that Powertech had previously proposed to reimburse the Tribes for participation in a survey by offering (i) \$136.00 per day for lodging for up to three participating tribal representatives per participating Tribe; (ii) \$59.00 per day for meals and incidental expenses for up to three participating tribal representatives per participating Tribe; (iii) \$0.535 per mile for up to two round trips for up to two vehicles per participating Tribe from the tribal representatives' point of origin to Edgemont, South Dakota; and (iv) a \$10,000 honorarium to each Tribe participating in the survey. The Staff stated that it was seeking confirmation from Powertech whether this proposed reimbursement would be offered again or whether a different reimbursement would be offered.¹⁵
9. In the December 6 letter, the Staff requested input from the Tribes on their preferred survey methodology. The letter provided examples of survey methods used in previous field surveys to identify sites of historic, cultural, and religious significance to Tribes conducted for other NRC projects, such as "conventional transect, a landscape-based assessment, or a combination [of multiple survey methods]."¹⁶
10. In the December 6 letter, the Staff requested the Oglala Sioux Tribe's assistance in facilitating the implementation of the final approach with the Lakota Sioux Tribes. In the letter, the Staff stated that based on the Staff's proposed approach, the Staff proposed that the Oglala Sioux Tribe share and gather input on the proposed approach from the Lakota Sioux Tribes, facilitate meetings with the Lakota Sioux Tribes, and coordinate with the Lakota Sioux Tribes on the input for the survey report.¹⁷
11. In the December 6 letter, the Staff requested the Oglala Sioux Tribe's assistance in confirming the identity of the remaining Lakota Sioux Tribes potentially impacted by the Dewey-Burdock project in order to ensure that the Staff had appropriately identified the Tribes with whom the Staff should correspond regarding its proposed approach.¹⁸
12. With the December 6 letter, the Staff enclosed a preliminary schedule for implementing the proposed approach. The preliminary schedule took into consideration the schedule expectations discussed in the Board's Order LBP-18-9, the limited activities that can be accomplished during the winter months, and the Tribes' previous comments regarding schedules and interests. The Staff stated that the preliminary schedule may change as a result of input provided by the parties on the proposed approach or other unforeseen circumstances.¹⁹
13. The Staff also sent the December 6 letter to the Tribes understood by the Staff to be the most likely affected by the Dewey-Burdock project – the Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe, and the Rosebud Sioux Tribe.²⁰

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

14. On December 6, 2017, the Staff sent a letter to Powertech that was substantively similar to the Staff's December 6, 2017 letter to the Oglala Sioux Tribe. In this letter, the Staff requested that Powertech confirm whether it would offer reimbursement in the amount previously proposed for Tribes participating in a survey or whether a different reimbursement would be offered.²¹
15. On December 6, 2017, the Staff sent a letter to the Consolidated Intervenor that was substantively similar to the Staff's December 6, 2017 letter to the Oglala Sioux Tribe.²²
16. In the December 6, 2017, letters to the Oglala Sioux Tribe, Powertech, and Consolidated Intervenor, the Staff requested the parties' final input on the proposed approach as soon as practicable but not later than January 19, 2018.²³
17. On December 12, 2017, the Board held a teleconference with the parties to discuss the status of efforts to resolve Contention 1A. Counsel for the Oglala Sioux Tribe stated that the components of the Staff's proposed approach, including "meeting with the tribal councils, coordinating oral histories and involving elders of the . . . tribe . . . are very welcome and consistent with what the Tribe had sought in . . . its May 31st letter."²⁴
18. On January 9, 2018, the Board requested that the Staff provide an estimate of cost for the approach proposed by the Staff in April 2017.²⁵
19. On January 17, 2018, in response to the Board's order, the Staff provided to the Board an estimate of costs associated with implementing the Staff's April 2017 approach. In addition, the Staff provided an estimate of costs for implementing the Staff's December 2017 proposed approach and, for reference purposes, an estimate of the current costs that would be associated with implementing the September 2012 Makoche Wowapi proposal.²⁶ The Staff estimated the cost of implementing the April 2017 approach at approximately \$619,200 and the cost of implementing the December 2017 proposed approach to be approximately \$792,300. These cost estimates included an estimate of Powertech's costs related to reimbursement and honoraria for one and five Tribes, respectively.²⁷ The Staff estimated the cost of implementing the Makoche Wowapi proposal to be approximately \$1,283,100. The cost estimate for all three approaches included one full-time-equivalent (FTE) for Staff efforts related to implementing the respective approaches.²⁸

²¹ Letter from Cinthya I. Román, Chief, Environmental Review Branch, to John Mays, Chief Operating Officer, Azarga Uranium Corporation (Dec. 6, 2017) (ADAMS Accession No. ML18002A539) [hereinafter Powertech December 6 Letter].

²² Letter from Cinthya I. Román, Chief Environmental Review Branch, to Messrs. Frankel, Ballanco, and Ellison (Consolidated Intervenor) (Dec. 6, 2017) (ADAMS Accession No. ML17340B376).

²³ *Id.*; OST December 6 Letter; Powertech December 6 Letter.

²⁴ Transcript of December 12, 2017 Teleconference (ADAMS Accession No. ML17348B174) at 1241; see OST May 31 Letter.

²⁵ Order (Scheduling Third Telephonic Conference Call) (Jan 9, 2018) (unpublished).

²⁶ NRC Staff Response to January 9, 2018 Order (Scheduling Third Telephonic Conference Call) (Jan. 17, 2018) (ADAMS Accession No. ML18017B322).

²⁷ *Id.* at Attachment 1.

²⁸ *Id.*

20. On January 19, 2018, the Oglala Sioux Tribe, Powertech, and Consolidated Intervenor separately provided input on the Staff's December 6, 2017, proposed approach.²⁹
21. The Oglala Sioux Tribe's January 19 input included several observations regarding the acceptability and reasonableness of the proposed approach:
- A. The Oglala Sioux Tribe stated that the Staff's December 6, 2017, letter "provides the outline of a plan that the [Oglala Sioux Tribe's Cultural Affairs and Historic Preservation Office] believes will provide a reasonable likelihood of satisfying NEPA and resolving the Oglala Sioux Tribe's long-standing NEPA contention" ³⁰
 - B. The Oglala Sioux Tribe stated that, "[w]hile several important details remain to be established, as noticed in [the Staff's] letter, the components that make up the basic structure of the plan are realistic, logical, and coincide well with the suggestions put forward by the Tribe and the expert testimony provided by NRC Staff and the Tribe in both the Crow Butte and Dewey-Burdock proceedings." ³¹
 - C. The Oglala Sioux Tribe stated that the "Staff's proposal rightly identifies a physical survey of the site with the participation of the affected Tribal governments and tribal members as a necessary element for proper identification of traditional cultural properties and resources." ³²
 - D. The Oglala Sioux Tribe indicated its approval of the Staff's plan to hire a qualified outside contractor. ³³ The Tribe stated that the Staff's "proposal appropriately acknowledges that the only practical way for NRC to design, conduct, and document the physical survey in compliance with NEPA is with the active participation and coordination of a professional contractor with adequate expertise and experience." ³⁴
 - E. The Oglala Sioux Tribe stated that the "Staff's commitment as set forth in its proposal to engage both the Tribal elders and the Tribal councils of multiple Tribes is also appropriate and welcome" and that "[t]he Cultural Affairs and Historic Preservation Office commits to working to facilitate NRC Staff's contact with these important groups." ³⁵
 - F. The Oglala Sioux Tribe described the field survey protocols of the proposed approach as "generally acceptable" and stated that "[o]nce the [NRC's] contractor

²⁹ Letter from Trina Lone Hill, Tribal Historic Preservation Officer, Oglala Sioux Tribe, to Cinthya I. Román, Chief, Environmental Review Branch (Jan. 19, 2018) (ADAMS Accession No. ML18019B267); Letter from John Mays, Chief Operating Officer, Azarga Uranium Corporation, to Cinthya I. Román, Chief, Environmental Review Branch (Jan. 19, 2018) (ADAMS Accession No. ML18019B268); Email to NRC from D. Frankel (Jan. 19, 2018) (ADAMS Accession No. ML18024A812).

³⁰ Letter from Trina Lone Hill, Tribal Historic Preservation Officer, Oglala Sioux Tribe, to Cinthya I. Román, Chief, Environmental Review Branch (Jan. 19, 2018) (ADAMS Accession No. ML18019B267).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

is on board, the Office believes these discussions can begin promptly and the detailed survey can be designed based on the contractor's input."³⁶

22. On January 19, 2018, the Consolidated Intervenor provided input on the Staff's December 6, 2017, proposed approach:
 - A. The Consolidated Intervenor stated that they were pleased with the proposed approach, and that the proposed approach "rightly identifies a physical survey of the site with the participation of the affected Tribal governments and tribal members as a necessary element for proper identification of traditional cultural properties and resources."³⁷
 - B. The Consolidated Intervenor stated that "the proposal appropriately acknowledges that the only practical way for NRC to design, conduct, and document the physical survey in compliance with NEPA is with the active participation and coordination of a professional contractor with adequate expertise and experience."³⁸
 - C. The Consolidated Intervenor described the proposed approach's involvement of "both the Tribal elders and the Tribal councils of multiple Tribes" as "appropriate and welcome."³⁹
 - D. The Consolidated Intervenor noted that, while flexibility should be preserved, the timeline associated with the proposed approach "appears achievable."⁴⁰
23. On January 19, 2018, Powertech provided input on the Staff's December 6, 2017, proposed approach. In its letter to the Staff, Powertech raised concerns regarding the cost of the proposed approach and the potential for the proposed approach to delay the approvals Powertech must obtain from the Environmental Protection Agency and Bureau of Land Management for the Dewey-Burdock project.⁴¹
24. On January 24, 2018, the Board held a teleconference with the parties to discuss the status of efforts to resolve Contention 1A:
 - A. In response to a question from the Board regarding whether the Oglala Sioux Tribe would participate in the execution of an approach resembling the proposed approach, counsel for the Tribe stated, "As we stated in our letter, we think the components that have been put forth align with the issues we've raised and have been raising for some time. So should the staff propose to move forward as proposed, we would participate."⁴²

³⁶ *Id.*

³⁷ Email to NRC from D. Frankel (Jan. 19, 2018) (ADAMS Accession No. ML18024A812), at 1.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Letter from John Mays, Chief Operating Officer, Azarga Uranium Corporation, to Cinthya I. Román, Chief, Environmental Review Branch (Jan. 19, 2018) (ADAMS Accession No. ML18019B268).

⁴² Transcript of January 24, 2018 Teleconference (ADAMS Accession No. ML18026A688), at 1273.

- B. In response to a question from the Board regarding whether the Oglala Sioux Tribe had reached out to the other Lakota Sioux Tribes to find out the likelihood of whether the other Tribes would participate in the proposed approach or to garner their reaction to the proposed approach, counsel for the Tribe stated, "We have been in touch with the other tribes and circulated the NRC letter. We stressed our positive reaction to the proposal, and that was acknowledged by some of the other tribes, although I have not, we have not gone so far as to follow up with detailed discussions on the extent or nature of their participation. However, as noted in our letter to NRC staff last Friday, the Oglala Sioux Tribe does commit to soliciting that input and helping to coordinate and arrange NRC staff's engagement with those other tribes."⁴³
- C. Regarding the involvement of the other Lakota Sioux Tribes, counsel for the Oglala Sioux Tribe further stated, "[t]he Oglala Sioux Tribe works very closely with several of the other tribes. That has been, similarly been a consistent position of the Tribe throughout the proceeding. And, indeed, in our May 31st letter from last year that sort of formed the basis of our discussion now when we're talking about our acceptance and our positive feeling towards the recent December NRC proposal, consistency with that May letter, one of the central points that we made sure to reiterate again, as we have from the beginning, is that coordination with those other tribes is how the tribe conducts its business. That leaves a central cultural tenet for the Oglala Sioux Tribe is to be engaged with and working with its other Sioux tribes up there. So that is something that the Oglala Sioux Tribe will always have high on their list and want to be part of. Now, we can't make them engage, the other tribes engage all the time or to be sent all that's requested, but what the Oglala Sioux Tribe did commit to is to put its effort to coordinating that approach for NRC staff so they could have those conversations and that engagement facilitated for them, and we're certainly willing to do so."⁴⁴
25. On February 1, 2018, counsel for the parties participated in a counsel-to-counsel teleconference to discuss the Staff's proposed approach, and the responses of the parties thereto:
- A. The parties discussed questions posed by the Staff to the parties, including questions regarding the necessary elements of a site survey approach and the cost of the approach.⁴⁵
- B. Counsel for the Tribe agreed to provide the parties within seven days a list of the other Tribes that it contemplated being part of any survey approach, including involvement via Tribal Council meetings and interviews with elders.⁴⁶
- C. Counsel for the Tribe agreed that in order to facilitate a timely and efficient process of meeting with identified Tribal Councils, the Tribe would work diligently to facilitate as much engagement with the identified Tribes within a matter of

⁴³ *Id.* at 1274.

⁴⁴ *Id.* at 1291–92.

⁴⁵ Notice of Summary Report of Counsel Conference Call (Feb. 6, 2018) (ADAMS Accession No. ML18037B127).

⁴⁶ *Id.* at unnumbered page 3.

some two weeks (presumably in the May timeframe) to minimize NRC Staff and consultant travel time.⁴⁷

26. On February 15, 2018, the Oglala Sioux Tribe responded to the Staff's questions from the February 1 counsel-to-counsel teleconference regarding the proposed approach:
- A. In response to the Staff's request that the Oglala Sioux Tribe "confirm the identities of the Native American (Lakota Sioux) tribes they believe the Staff must involve in the effort to identify Lakota Sioux cultural properties that may be affected by the Dewey-Burdock project," the Oglala Sioux Tribe stated that the "Oglala Sioux Tribe is willing to assist the NRC Staff meet NRC's NEPA duty to ensure that the Sioux tribal governments are invited, and therefore are allowed their own decision on whether or not to be involved in the survey, or the NEPA process more generally. These include the Oglala Sioux Tribe, the Standing Rock Sioux Tribe, the Rosebud Sioux Tribe, the Cheyenne River Sioux Tribe, Yankton Sioux Tribe, Crow Creek Sioux Tribe, Flandreau Sioux Tribe."⁴⁸
 - B. The Oglala Sioux Tribe stated that its "Historical Preservation Office has been working diligently to make contact with its colleagues," and, "[a]t present, the Rosebud Sioux Tribal Historic Preservation Office and the Standing Rock Sioux Tribal Historic Preservation Office are prepared to participate. The Oglala Sioux Tribe Historic Preservation Office will continue with this outreach."⁴⁹
 - C. In response to a question from the Staff regarding whether the Oglala Sioux Tribe "supports the timeframe specified by the Staff in its December 2017 proposal for Tribal Council meetings, interviews of tribal elders, and dates/duration of site surveys," the Tribe stated, "[a]s discussed on the February 1, 2018 counsel conference call, the Tribe supports the timeframe set forth in the Staff's December 2017 proposal."⁵⁰
 - D. In response to a question from the Staff regarding the Oglala Sioux Tribe's preparation to finalize the selection of a survey methodology involving certain elements, the Oglala Sioux Tribe stated that it believes "having a qualified contractor oversee and manage the process, providing opportunities for engagement of tribal elders and councils, allowing time and opportunity for repeat visits to the site spaced out over time, as well as the ability to review and comment on the resulting reports are essential components" of a site survey methodology. The Tribe also stated, "[a]s discussed on the February 1, 2018 counsel conference call, the Tribe confirmed that it believes the entire permit area should be open for survey given the nature of the cultural impacts that could include landscape level considerations. Counsel for the Tribe pointed out that for efficiency's sake, the Tribe would work with the contractor and NRC Staff to identify and prioritize certain areas of the entire site[.]"⁵¹

⁴⁷ *Id.*

⁴⁸ Notice of Oglala Sioux Tribe Responses to NRC Staff Questions (Feb. 15, 2018) (ADAMS Accession No. ML18046A171), at unnumbered page 3.

⁴⁹ *Id.* at unnumbered pages 3–4.

⁵⁰ *Id.* at unnumbered page 4.

⁵¹ *Id.* at unnumbered pages 4–5.

- E. In response to a question from the Staff regarding “what direct reimbursement from Powertech would be necessary to support the Tribe’s participation in a site survey,” the Oglala Sioux Tribe stated that, while it is difficult to respond precisely, “[t]he Tribe would anticipate that an amount on the order of what was proposed previously would be appropriate.”⁵²
27. On February 23, 2018, the Board held a teleconference with the parties to discuss the status of efforts to resolve Contention 1A. In response to a statement from the Board to the Oglala Sioux Tribe that the Board “hope[s] [the Tribe] will continue [its] efforts to work with the staff and . . . do all that [the Tribe] can to make sure that all of the parties that are . . . identified by the staff and are necessary to the staff proposal are available and responsive to the staff’s request,” counsel for the Oglala Sioux Tribe stated, “the Tribe has made that commitment, and we intend to stick to it.”⁵³
28. On March 16, 2018, the Staff sent a letter to the Oglala Sioux Tribe that described the Staff’s selected approach to identify sites of historic, cultural, and religious significance to the Lakota Sioux Tribes and gather information to supplement the FSEIS for the Dewey-Burdock ISR project.⁵⁴
29. In the March 16 letter, the Staff stated that the selected approach was based on the Oglala Sioux Tribe’s statements that the NRC’s December 2017 proposed approach would provide a reasonable likelihood of satisfying NEPA.⁵⁵
30. The Staff’s selected approach incorporated the essential components of the December 2017 proposed approach. The approach included the following elements:
- A. Securing a contractor to facilitate the implementation of the approach;
 - B. Meeting with Tribal Councils or Tribal Leaders of the Lakota Sioux Tribes based on their availability and the timeframe for implementing the proposed approach;
 - C. Requesting oral history interviews with the Tribal Elders of the Lakota Sioux Tribes to gather information regarding resources of significance to their respective Tribe that could be impacted by the Dewey-Burdock ISR project;
 - D. Coordinating a field survey at the Dewey-Burdock ISR site including the following elements:
 - i. Inviting the Lakota Sioux Tribes who did not participate in the April 2013 survey of the Dewey-Burdock ISR site, including the Oglala Sioux Tribe, to participate in the survey with up to three tribal representatives per Tribe;

⁵² *Id.* at unnumbered page 5.

⁵³ Transcript of February 23, 2018 Teleconference (ADAMS Accession No. ML18058B785), at 1324.

⁵⁴ Letter from Cinthya I. Román, Chief, Environmental Review Branch, to Trina Lone Hill, Tribal Historic Preservation Officer, Oglala Sioux Tribe (Mar. 16, 2018) (ADAMS Accession No. ML18074A396) [hereinafter March 16, 2018 Letter].

⁵⁵ *Id.* at 1.

- ii. Using a survey methodology that will be established in coordination with the NRC, with the support of the contractor, and the Lakota Sioux Tribes, in advance of the field survey;
 - iii. A survey period of four weeks in length to be divided in two phases – two weeks commencing June 11, 2018, and two weeks commencing September 3, 2018;
 - iv. Allowing for the examination of areas of the Tribes' choosing within the entire Dewey-Burdock license area, although tribal representatives would be encouraged to focus their survey efforts on the areas of potential disturbance within the license area;
 - v. Using an NRC contractor to facilitate the survey and document findings and supporting information, as appropriate, to be considered in the development of the survey report;
- E. Providing the Tribes opportunities to provide input on, and review and comment upon, the field survey report;
- F. Preparing a supplement to the FSEIS for the Dewey-Burdock ISR project describing potential impacts to sites of historic, cultural, or religious significance to the Lakota Sioux Tribes using the information gathered through the field survey, meetings with Tribal Leaders, oral history interviews, and any other information provided by the Tribes.⁵⁶
31. In the March 16 letter, the Staff stated that based on the information provided by the Oglala Sioux Tribe in its letter dated February 15, 2018, the Staff would invite the Oglala Sioux Tribe, Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, Rosebud Sioux Tribe, Yankton Sioux Tribe, and Flandreau Santee Sioux Tribe to participate in the field survey and other elements of the selected approach. The Staff further stated that it planned to invite the Crow Creek Sioux Tribe – which had already participated in the 2013 tribal field survey – to participate in all of the elements of the selected approach except the field survey.⁵⁷
32. In the March 16 letter, the Staff stated that once the Staff brought on board its contractor, the Staff planned to hold a meeting with the Lakota Sioux Tribes interested in participating in the field survey to discuss and establish the survey methodology and potential areas to be examined during the field survey.⁵⁸
33. With the March 16 letter, the Staff set a schedule and milestones for the selected approach. The Staff stated that delays in the schedule would impact its ability to carry out the approach as described in the letter and requested the Oglala Sioux Tribe's cooperation in ensuring that the milestones are met.⁵⁹

⁵⁶ March 16, 2018 Letter at 1–5; Enclosure 1 – Timeline for NRC Approach for Obtaining Information on Lakota Sioux Cultural Resources Potentially Impacted by the Dewey-Burdock ISR Project (Mar. 16, 2018) (ADAMS Accession No. ML18074A397) [hereinafter Enclosure 1].

⁵⁷ March 16, 2018 Letter at 2.

⁵⁸ *Id.* at 4.

⁵⁹ *Id.*; Enclosure 1.

34. The Staff requested in the March 16 letter the Oglala Sioux Tribe's response regarding its willingness to participate in the implementation of the Staff's approach and timeline no later than March 30, 2018.⁶⁰
35. The March 16 letter to the Oglala Sioux Tribe was also sent to the Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, Rosebud Sioux Tribe, Yankton Sioux Tribe, Crow Creek Sioux Tribe, and Flandreau Santee Sioux Tribe, for their information.⁶¹
36. On March 16, 2018, the Staff sent a letter to Powertech substantively similar to the Staff's March 16, 2018 letter to the Oglala Sioux Tribe. In this letter, the Staff requested that Powertech consider offering reimbursement to Tribes participating in the field survey.⁶²
37. On March 16, 2018, the Staff sent a letter to the Consolidated Intervenors summarizing the selected approach. With this letter, the Staff enclosed the March 16 letters to the Oglala Sioux Tribe and Powertech.⁶³
38. On March 27, 2018, the Board held a teleconference with the parties to discuss the status of efforts to resolve Contention 1A:
- A. In response to a question from the Board regarding the selected approach, counsel for the Oglala Sioux Tribe noted that the selected approach reflected "a substantial similarity to the previous [December 2017] proposal" and that the dates for implementing the selected approach "are . . . generally consistent with the previous proposal." Counsel for the Tribe also acknowledged that counsel for the Staff communicated that the terms of the selected approach were "very firm."⁶⁴
- B. In response to a question from the Board about the Oglala Sioux Tribe's commitments regarding outreach on the selected approach to the Rosebud Sioux Tribe and Standing Rock Sioux Tribe, counsel for the Tribe affirmed the Tribe's previous commitment to reaching out to those Tribes and affirmed that the Tribe's communications going forward will be to the other Sioux tribes beyond just the Rosebud Sioux Tribe and Standing Rock Sioux Tribe.⁶⁵
39. On March 30, 2018, the Oglala Sioux Tribe responded to the Staff's March 16, 2018 selected approach:
- A. The Oglala Sioux Tribe stated, "Based on the approach described, the Tribe continues to believe these efforts may provide a reasonable path toward NRC

⁶⁰ March 16, 2018 Letter at 5.

⁶¹ *Id.* at 6.

⁶² Letter from Cinthya I. Román, Chief, Environmental Review Branch, to John Mays, Chief Operating Officer, Azarga Uranium Corporation (Mar. 16, 2018) (ADAMS Accession No. ML18074A232), at 4.

⁶³ Letter from Cinthya I. Román, Chief, Environmental Review Branch, to Messrs. Frankel, Ballanco, and Ellison (Consolidated Intervenors) (Mar. 16, 2018) (ADAMS Accession No. ML18075A414).

⁶⁴ Transcript of March 27, 2018 Teleconference (ADAMS Accession No. ML18087A744), at 1344, 1354.

⁶⁵ *Id.* at 1345.

satisfying NEPA and resolving the Oglala Sioux Tribe's long-standing NEPA contention."⁶⁶

- B. The Oglala Sioux Tribe stated that the selected approach "lacks two important details" relating to the invited tribes' involvement in the selection of the Staff's contractor for the approach and reimbursement for the tribes' participation in the approach. The Tribe stated that, "[w]hile the Tribe has, and remains, committed to participating in the approach identified by NRC Staff," the issues identified by the Tribe "could significantly affect the extent of the Tribe's participation and its ability to successfully coordinate the participation of other Tribes."⁶⁷
 - C. The Oglala Sioux Tribe stated that it looked forward to discussing the field survey methodology "as contemplated in the timeline attached to the NRC Staff's March 16, 2018 proposal, in partnership with both NRC Staff and with the benefit of the expertise and experience of the selected contractor."⁶⁸
40. On March 30, 2018, Powertech responded to the Staff's March 16, 2018 selected approach. Powertech described the costs it had incurred on NRC licensing activities to date and expressed its conditional agreement to the selected approach if certain conditions are met, in particular with respect to the importance of the timeline for implementation.⁶⁹
41. On April 6, 2018, the Board held a teleconference with the parties to discuss the status of efforts to resolve Contention 1A:
- A. In response to a question from the Board, counsel for the Oglala Sioux Tribe stated that the Tribe was "comfortable with, as we stated multiple times, the approach that the NRC staff has laid out."⁷⁰ Counsel for the Tribe also stated that the dates for implementing the selected approach, "[a]lthough somewhat tight, I think are achievable. And so the Tribe is, at this point, comfortable with those." Counsel for the Tribe reiterated that "the Tribe is comfortable with that time line."⁷¹
 - B. In response to a question from the Board whether the Tribe's objections concerning reimbursement and involvement in the selection of the Staff's contractor were "sufficiently critical that they will prevent the Oglala Sioux Tribe from participating in the March 2018 approach," counsel for the Tribe stated, "Would it prevent the Tribe from participating entirely? No, it will not."⁷²
 - C. With regard to the selected approach, counsel for the Oglala Sioux Tribe stated, "We've been encouraged by NRC staff's proposal and their most recent proposal

⁶⁶ Oglala Sioux Tribe's Response to Staff's March 16, 2018 Cultural Resources Survey Proposal (Mar. 30, 2018) (ADAMS Accession No. ML18089A655), at 1.

⁶⁷ *Id.* at 1–4.

⁶⁸ *Id.* at 4.

⁶⁹ Letter from John Mays, Chief Operating Officer, Powertech USA Inc., to Cinthya I. Román, Chief, Environmental Review Branch (Mar. 30, 2018) (ADAMS Accession No. ML18089A656), at unnumbered pages 1–3.

⁷⁰ Transcript of April 6, 2018 Teleconference (ADAMS Accession No. ML18100A912), at 1389.

⁷¹ *Id.* at 2395.

⁷² *Id.* at 1394.

of March 2018. Their capacity to listen to our concerns and incorporate, although not everything we want . . . And so we maintain the position that the March 2018 approach is a reasonable one and would not like to see backsliding to the proposals that have led to this litigation from the start.” Counsel for the Tribe reiterated that “the Tribe can support the approach. . . . I think the Tribe has been clear on this call and frankly in its letter that we’re committed to moving forward.”⁷³

- D. In response to a question from the Board regarding the Oglala Sioux Tribe’s requested involvement in selecting a contractor and developing the scope of work in the proposal, counsel for the NRC staff stated that “the NRC cannot provide an opportunity for the Oglala Sioux Tribe to provide input on the statement of work or selection of a contractor the staff will be using to implement the selected approach.” NRC staff counsel stated that because the NRC would be hiring the contractor directly (in contrast to a previous survey negotiation where the licensee had hired its own contractor), federal procurement and contract laws would apply. Counsel for the Staff stated that these laws “preclude the Tribe’s involvement in the staff[’s] selection of a contractor or development of a contractor’s statement of work.”⁷⁴
 - E. Regarding the timeline for implementing the selected approach, counsel for the Staff stated that “to meet the essential elements that the Tribe has noted are critical to them . . . we have to move forward on the schedule that we’ve provided. So any further delay in this matter . . . would incur at least a year’s delay before re-attempting it next year because one of the essential elements of this approach is that we have two site survey opportunities. And we have in the middle of that . . . a cultural obligation [that the Tribe is] committed to. . . . So if we don’t move forward at this point . . . then the result is that there will be no such approach, most likely.”⁷⁵
42. On April 11, 2018, Powertech provided a supplemental response to the Staff’s March 16, 2018 selected approach:
- A. Powertech stated that it “agrees to support the approach outlined in the NRC Staff’s letter dated March 16, 2018 to identify historic, cultural, and religious sites at the Dewey-Burdock Project and would like the NRC Staff to urgently proceed with the approach and timeline outlined in [the March 16] letter.”⁷⁶
 - B. Powertech stated that it “agrees to reimburse each Lakota Sioux Tribe that participates in the NRC Staff approach using reimbursement rates consistent with those offered by the NRC Staff to the Oglala Sioux Tribe in the NRC Staff letter dated April 14, 2017 (ML17103A500). These reimbursement rates are also

⁷³ *Id.* at 1431–42, 1435, 1439.

⁷⁴ *Id.* at 1380–81.

⁷⁵ *Id.* at 1427–28.

⁷⁶ Letter from John Mays, Chief Operating Officer, Powertech USA Inc., to Cinthya I. Román, Chief, Environmental Review Branch (Apr. 11, 2018) (ADAMS Accession No. ML18101A223), at unnumbered page 1.

consistent with those referenced in the NRC Staff letter dated March 16, 2018 and the NRC Staff cost estimate dated January 17, 2018 (ML18017B322).⁷⁷

- C. Powertech stated that it would provide \$136.00 per day for lodging and \$59.00 per day for meals and incidental expenses for each tribal representative; \$0.535 per mile for one round trip for each phase of the field survey (two phases) for up to two vehicles for each Lakota Sioux Tribe from the tribal representatives' point of origin to Edgemont, South Dakota; and a \$10,000 honorarium to each Lakota Sioux Tribe to be used at each Tribe's discretion. The honorarium would be paid to each tribe on successful completion of all activities pertaining to the Staff's approach, in accordance with the timeline developed by the Staff.⁷⁸
- D. Powertech stated that it agreed to provide the field survey support requested in the Staff's March 16, 2018 letter.⁷⁹

III. Implementation of Selected Approach to Address Contention 1A

- 43. On April 11, 2018, the Staff informed the Board that it intended to commence activities to implement the selected approach. The Staff stated, "Having assurance that Powertech will provide the field survey support necessary to the implementation of the Staff's selected approach, the Staff intends to issue letters to the other Lakota Sioux Tribes on April 12, 2018, inviting them to participate in the Staff's selected approach and requesting their responses by May 11, 2018." The Staff also relayed a communication from the Oglala Sioux Tribe regarding staffing changes in the Tribal Historic Preservation Office and the statement that the Tribe's position in support of the Staff's approach had not changed, and that the Tribe looked forward to participating in the upcoming efforts.⁸⁰
- 44. In April and May 2018, the Staff sought the input of the Oglala Sioux Tribe, Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, Rosebud Sioux Tribe, Yankton Sioux Tribe, Flandreau Santee Sioux Tribe, and Crow Creek Sioux Tribe on their interest in participating in the selected approach:
 - A. On April 12, 2018, the Staff sent letters to the Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, Rosebud Sioux Tribe, Yankton Sioux Tribe, Flandreau Santee Sioux Tribe, and Crow Creek Sioux Tribe, describing the selected approach, its associated timeline, and Powertech's commitments regarding reimbursement for participating in the approach. The Staff also stated that it had requested the Oglala Sioux Tribe's assistance in facilitating the implementation of the approach with the Lakota Sioux Tribes and expressed its understanding that the Oglala Sioux Tribe had already begun such efforts. The Staff requested that the Tribes respond regarding their interest and willingness to participate in the selected approach and timeline no later than May 11, 2018. The Staff welcomed input or information from the Tribes regarding a survey

⁷⁷ *Id.* at unnumbered page 2.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Staff's Letter to Board Regarding Staff Action on Approach (Apr. 11, 2018) (ADAMS Accession No. ML18101B100), at 2.

methodology and their preferred dates and times for a webinar with the Staff during the week of May 28, 2018.⁸¹

- B. On April 13, 2018, the Staff sent a letter to the Oglala Sioux Tribe confirming the Staff's plan to move forward with the selected approach and conveying Powertech's commitments regarding reimbursement for participating in the approach as described in Powertech's April 11, 2018 letter to the Staff. The Staff stated that it appreciated the Tribe's commitment to participating in the selected approach and its commitment to assisting the Staff with the coordination of the other Tribes. The Staff requested the Oglala Sioux Tribe's continued cooperation with these coordination efforts. The Staff also welcomed input or information from the Tribe regarding a survey methodology and its preferred dates and times for a webinar with the Staff during the week of May 28, 2018.⁸²
- C. On May 16, 2018, the Staff sent follow-up letters to the Oglala Sioux Tribe, Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, Rosebud Sioux Tribe, Yankton Sioux Tribe, and Flandreau Santee Sioux Tribe. The Staff informed the Tribes that the Staff had brought on board a contractor to facilitate implementation of the selected approach. The Staff proposed dates and times for a webinar with the Tribes "to discuss and establish the areas to be examined and the survey methodology to be implemented during the field survey scheduled for June and September 2018," and requested a response regarding these dates by May 22, 2018. The Staff reiterated its invitation to provide input or information in advance of the webinar to establish the survey methodology.⁸³
- D. On May 18, 2018, the Standing Rock Sioux Tribe responded to the Staff with a request for additional dates for the webinar after the week of May 28, 2018.⁸⁴
- E. During the week of May 21, 2018, the Staff followed up by telephone with the Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, Rosebud Sioux Tribe, Yankton Sioux Tribe, Flandreau Santee Sioux Tribe, and counsel for the Oglala Sioux Tribe. In a telephone conversation, the Flandreau Santee Sioux Tribe expressed a preference for June 1, 2018.⁸⁵
- F. On May 24, 2018, the Staff sent follow-up letters to the Oglala Sioux Tribe, Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, Rosebud Sioux Tribe, Yankton Sioux Tribe, and Flandreau Santee Sioux Tribe providing dates and

⁸¹ Letter to Tribes from NRC Regarding NRC's Final Approach to Identify Historic, Cultural, and Religious Sites at the Dewey-Burdock In Situ Uranium Recovery Project in Fall River and Custer Counties, South Dakota (Apr. 12, 2018) (ADAMS Accession Nos. ML18102B241, ML18102B238, ML18102B247, ML18102B227, ML18102B246, ML18102B232).

⁸² Letter to Oglala Sioux Tribe from NRC re: NRC's Final Approach to Identify Historic, Cultural, and Religious Sites at the Dewey-Burdock In Situ Uranium Recovery Project in Fall River and Custer Counties, South Dakota (Apr. 12, 2018) (ADAMS Accession No. ML18103A150).

⁸³ Letter to Tribes from NRC Regarding NRC's Approach to Identify Historic, Cultural, and Religious Sites and the Dewey-Burdock ISR Project – Scheduling Webinar May 2018 (May 16, 2018) (ADAMS Accession Nos. ML18135A227, ML18135A195, ML18135A218, ML18135A244, ML18135A232, ML18135A201).

⁸⁴ Email from Jon Eagle, Standing Rock Sioux Tribe, to NRC Staff (May 18, 2018) (ADAMS Accession No. ML18150A306).

⁸⁵ Records of Telephone Calls with Tribes on May 21 and May 22, 2018 (ADAMS Accession Nos. ML18143B329, ML18143B287, ML18143B315, ML18143B298, ML18143B313, ML18143B306).

times for the webinar. Based upon the input of the two Tribes that relayed their availability to the Staff, the Staff scheduled webinars for June 1 and June 4, 2018.⁸⁶

45. On May 24, 2018, the Staff sought the input of the Lower Brule Sioux Tribe on the Tribe's interest in participating in the selected approach. The Staff informed the Lower Brule Sioux Tribe that it had invited several Tribes to participate in the selected approach based in part on information received from the Oglala Sioux Tribe, and based on the input of the Staff's contractor, the Staff was extending the same invitation to the Lower Brule Sioux Tribe.⁸⁷ The Staff also reached out to the Lower Brule Sioux Tribe by telephone⁸⁸ and email⁸⁹ on May 24, 2018, and again by email on May 31, 2018.⁹⁰
46. On May 31, 2018, the Staff sent follow-up emails to the invited Tribes regarding the webinar.⁹¹ The Staff also provided PowerPoint slides for the webinar. The PowerPoint slides presented two potential options for methodologies for conducting the tribal field survey effort for discussion with the Tribes.⁹²
47. On June 1 and 4, 2018, the Staff held a webinar for the invited Tribes. Counsel for the Oglala Sioux Tribe participated in the June 1 webinar, and representatives of the Oglala Sioux Tribe and its counsel participated in the June 4 webinar. An additional teleconference session was held on June 5, 2018. Representatives of the Oglala Sioux Tribe and Rosebud Sioux Tribe participated in the June 5, 2018 teleconference session. The Staff and its contractor participated in all three sessions.⁹³ No representatives of the other invited Tribes participated in the webinars.⁹⁴
48. In the webinar and teleconference, the Staff stated that the desired outcome was to collectively establish a methodology to be implemented during the tribal field survey effort. The Staff's contractor presented the potential options for methodologies described in the PowerPoint presentation and sought the input of the Oglala Sioux Tribe and Rosebud Sioux Tribe on the methodology for the field survey. The Staff's contractor discussed with, and sought input from, the Tribes on how findings from the survey would be documented. The Staff's contractor also acknowledged the Rosebud Sioux Tribe's THPO's concern about potential disturbances to bald eagle nests that the THPO recalled

⁸⁶ Letter to Tribes from Cinthya I. Román, NRC (May 24, 2018) (ADAMS Accession Nos. ML18144A969, ML18144A988, ML18144A993, ML18144A997, ML18144A982, ML18144A991).

⁸⁷ Letter to C. Green, Lower Brule Sioux Tribe, from C. Román, NRC (May 24, 2018) (ADAMS Accession No. ML18144A067).

⁸⁸ Record of Telephone Call with Lower Brule Sioux Tribe (May 24, 2018) (ADAMS Accession No. ML18149A473).

⁸⁹ Email to C. Green, Lower Brule Sioux Tribe, from D. Diaz-Toro, NRC (May 24, 2018) (ADAMS Accession No. ML18150A235).

⁹⁰ Email to C. Green, Lower Brule Sioux Tribe, from D. Diaz-Toro, NRC (May 31, 2018) (ADAMS Accession No. ML18183A165).

⁹¹ Emails to Tribes from K. Jamerson, NRC (May 31, 2018) (ADAMS Accession Nos. ML18152B844, ML18152B841, ML18152B837, ML18152B681, ML18152B685).

⁹² Slides for NRC Webinar and Teleconference Call with Tribes to Discuss the Survey Methodology, June 1 and June 4, 2018 (ADAMS Accession No. ML18152A676).

⁹³ Summary of U.S. Nuclear Regulatory Commission Webinar and Teleconference Call Sessions to Discuss Survey Methodology for the Dewey-Burdock In Situ Uranium Recovery (ISR) Project (ADAMS Accession No. ML18164A241).

⁹⁴ *Id.*

were present at the Dewey-Burdock site. The Staff and the Tribes did not finalize a methodology for the tribal field survey during these sessions.⁹⁵

49. In the webinar and teleconference, the Tribe also requested that the Staff ask Powertech whether it could provide reimbursement for the participation of additional Oglala Sioux Tribe representatives. The Staff agreed to convey this request to Powertech. The Staff also stated that Powertech agreed to provide reimbursement for up to three tribal representatives per Tribe, but that additional tribal representatives are welcome to participate in the survey.⁹⁶
50. On June 5, 2018, the Staff's contractor provided the invited Tribes a proposed plan of work consisting of an initial methodology for conducting the tribal field survey. The Staff's contractor requested comments of the Tribes on the proposed plan.⁹⁷ The proposed plan of work would have been followed for the first three or four days of the field effort, with subsequent field activities determined in consultation with the participating Tribes.⁹⁸
51. On June 7, 2018, the Cheyenne River Sioux Tribe informed the Staff that it did not agree with the selected approach as it was not developed with or by the Cheyenne River Sioux Tribe.⁹⁹ On June 8, 2018, the Staff responded by email, expressing its understanding that the Cheyenne River Sioux Tribe would not be joining the Staff for the June 2018 tribal field survey effort.¹⁰⁰
52. On June 7, 2018, the Staff's contractor provided the invited Tribes a literature review report developed by the contractor. The contractor informed the Tribes that the report may "include some pertinent background information for the upcoming Tribal field investigations at the Dewey-Burdock site."¹⁰¹ The literature review report documented the contractor's review of existing information about historic, cultural, and religious resources of significance to the invited Tribes for the Dewey-Burdock project. The report focused on information pertaining to sites within the project boundary, as well as the immediately surrounding area.¹⁰²
53. On June 8, 2018, the Staff informed the invited Tribes of a meeting location and time for the tribal field survey effort commencing June 11, 2018.¹⁰³ Later that day, the Oglala Sioux Tribe responded to this email requesting the Staff not plan to go into the field on June 11 and informing the Staff that the Tribe would be providing "a detailed response to

⁹⁵ *Id.*

⁹⁶ *Id.* at 6–7.

⁹⁷ Email to Tribes from Paul Nickens, SC&A (June 5, 2018) (ADAMS Accession No. ML18157A108).

⁹⁸ Proposed Initial Work Plan for Phase 1 Tribal Field Survey at the Dewey-Burdock ISR Project Area, June 11-22, 2018 (June 5, 2018) (ADAMS Accession No. ML18157A092).

⁹⁹ Letter from Steven Vance, Cheyenne River Sioux Tribe, to Cinthya I. Román, Chief, Environmental Review Branch (June 7, 2018) (ADAMS Accession No. ML18160A008).

¹⁰⁰ Email to Steven Vance, Cheyenne River Sioux Tribe, from Diana Diaz-Toro, NRC (June 8, 2018) (ADAMS Accession No. ML18163A246).

¹⁰¹ Email to Tribes from Paul Nickens, SC&A (June 7, 2018) (ADAMS Accession No. ML18159A191).

¹⁰² Compilation and Evaluation of Existing information for the National Environmental Policy Act Review of Lakota Historic, Cultural, and Religious Resources for the Dewey-Burdock In Situ Uranium Recovery Project (June 2018) (ADAMS Accession No. ML18159A192).

¹⁰³ Email to Tribes from Diana Diaz-Toro, NRC (June 8, 2018) (ADAMS Accession Nos. ML18163A252, ML18163A241, ML18163A250, ML18163A243, ML18163A256, ML18163A255).

the work plan today that sets out a proposed daily schedule with time, place, and tasks required to complete the necessary prerequisites.” The Tribe informed the Staff that “the field survey protocols and methods will be worked out with the benefit of face-to-face discussions between NRC contractors and the Tribes’ professional staff, with the benefit of necessary protections for the Tribes’ cultural and religious interests.”¹⁰⁴

54. On June 8, 2018, the Oglala Sioux Tribe sent the Staff and other invited Tribes a memorandum describing a proposed schedule for the June tribal field survey effort.¹⁰⁵
- A. The Tribe’s memorandum set forth several prerequisites to any field activities undertaken with the Oglala Sioux Tribe and a schedule and plan of work for the two weeks of the June tribal field survey effort, which called for the Staff to meet with the Oglala Sioux Tribe in Pine Ridge, South Dakota, on June 11 and 12, 2018, to discuss and agree upon “survey methodologies and protocols.”
- B. The Tribe’s schedule and plan of work included obtaining the Tribe’s “THPO [Tribal Historic Preservation Office] Advisory Council approvals for field survey methodology and protection of cultural resources” on June 13, 2018.
55. On June 8, 2018, the Staff informed the Tribe that it agreed to meet with the Oglala Sioux Tribe in Pine Ridge, South Dakota, on June 11, 2018. The Staff stated that it had copied the invited Tribes on its response but requested that the Oglala Sioux Tribe also inform the invited Tribes about its new proposed meeting time and location. The Staff also stated that it planned to have individuals present at the previously-communicated tribal field survey meeting location to meet any Tribes who may arrive.¹⁰⁶
56. On June 7, 2018, the Oglala Sioux Tribe requested that the Staff’s contractors provide “the name, a short biography, and contact information for each person who is working or plans to work on the survey, whether on site or remotely.”¹⁰⁷
57. On June 9, 2018, in response to the Oglala Sioux Tribe’s June 7 request, the Staff provided the Tribe with the biographies of the principal contractors supporting the implementation of the selected approach.¹⁰⁸

IV. Oglala Sioux Tribe’s Cultural Resources Survey Proposal

58. On June 11, 2018, a member of the Staff, Ms. Diana Diaz-Toro, and the Staff’s contractor, Dr. Paul Nickens, met with Mr. Kyle White, Acting THPO, and other representatives of the Oglala Sioux Tribe at the Tribal Historic Preservation Offices in

¹⁰⁴ Email from T. Stills, Counsel for Oglala Sioux Tribe, to D. Diaz-Toro, NRC (June 8, 2018) (ADAMS Accession No. ML18159A585).

¹⁰⁵ Email from T. Stills, Counsel for Oglala Sioux Tribe, to NRC and Tribes (June 8, 2018) (ADAMS Accession No. ML18159A620).

¹⁰⁶ Email to T. Stills, Counsel for Oglala Sioux Tribe, from D. Diaz-Toro, NRC (June 8, 2018) (ADAMS Accession No. ML18159A625).

¹⁰⁷ Email to T. Stills, Counsel for Oglala Sioux Tribe, from D. Diaz-Toro, NRC (June 9, 2018) (ADAMS Accession No. ML18160A013).

¹⁰⁸ *Id.*

Pine Ridge, South Dakota, to continue discussions to obtain the Tribe's input regarding a methodology for the June tribal field survey.¹⁰⁹

59. On June 12, 2018, Ms. Diaz-Toro and Dr. Nickens again met with Mr. White and representatives of the Oglala Sioux Tribe at the Tribal Historic Preservation Offices in Pine Ridge, South Dakota.¹¹⁰ The Tribe presented Ms. Diaz-Toro and Dr. Nickens with a memorandum entitled "Discussion Draft – Cultural Resources Survey Methodologies."¹¹¹
- A. The proposal was addressed to Ms. Diaz-Toro and Dr. Nickens and instructed that it "shall not be disclosed or discussed with any federal employee or contractor not specifically addressed in this memo."¹¹²
 - B. The proposal stated that "the prerequisites set out in the [June 8, 2018 memo circulated by Travis Stills] must be satisfied before any cultural resources survey activities may take place that involve Lakota peoples or Lakota cultural, historical, or spiritual knowledge."¹¹³
 - C. The proposal described the June tribal field survey effort as "preliminary work" based on an "analysis of publicly available information, and Powertech's proposed siting of it facilities [sic]."¹¹⁴
 - D. The Tribe's proposal would entail the involvement and remuneration of several dozen Oglala Sioux Tribe technical staff, spiritual leaders, elders, and warrior society leaders.¹¹⁵
 - E. The Tribe's proposal would entail using the Staff's contractor for specific aspects of the approach.¹¹⁶
 - F. The Tribe's proposal would entail visits and encampments by the Oglala Sioux Tribe elders at the Dewey-Burdock site over several days during the different seasons of the year.¹¹⁷
 - G. The Tribe's proposal would entail a 10-meter transect-based tribal cultural field survey of the entire Dewey-Burdock site. The memorandum states that "10m intervals are required to obtain locations of TCPs which have been overlooked in past archaeological surveys."¹¹⁸

¹⁰⁹ Affidavit of Diana Diaz-Toro Concerning the NRC Staff's Motion for Summary Disposition of Contention 1A (Aug. 17, 2018) (Attachment 2), ¶ 9.

¹¹⁰ Email to K. White, Acting THPO, Oglala Sioux Tribe, from D. Diaz-Toro, NRC (Jun. 12, 2018) (ADAMS Accession No. ML18173A191).

¹¹¹ Memorandum from Kyle White, Acting THPO, Oglala Sioux Tribe, to Diana Diaz-Toro, NRC, and Paul Nickens, SC&A (ADAMS Accession No. ML18170A140) (non-public) (Attachment 3).

¹¹² *Id.* at 1.

¹¹³ *Id.*

¹¹⁴ *Id.* at unnumbered pages 1–2.

¹¹⁵ *Id.* at unnumbered pages 1–5.

¹¹⁶ *Id.* at unnumbered page 3.

¹¹⁷ *Id.* at unnumbered pages 2–3.

¹¹⁸ *Id.* at unnumbered page 4.

- H. The Tribe's proposal would require more than a year to complete the fieldwork associated with the tribal cultural field survey and the oral history research and interviews.¹¹⁹
 - I. By the Tribe's estimation, the "full budget to carry out the required survey" would exceed \$2 million.¹²⁰ The cost estimate for the Tribe's proposal did not include (i.e., would be in addition to) the costs directly billable to Powertech for the Staff's time and contractor support.¹²¹
 - J. The Tribe's proposal does not take into account or make provision for the involvement of other Tribes in the approach.¹²²
60. On June 13, 2018, the Oglala Sioux Tribe convened a meeting of its Cultural Affairs and Historic Preservation Advisory Council.¹²³ Ms. Diaz-Toro and Dr. Nickens attended the meeting for the purpose of answering any questions from the Advisory Council about the Dewey-Burdock project and the selected approach. The Advisory Council communicated to the Staff several concerns regarding the adequacy and terms of the Staff's overall approach.¹²⁴
61. On June 14, 2018, the Oglala Sioux Tribe informed the Staff that the Tribe expected to provide the Staff with an updated version of its June 12, 2018 proposal that would incorporate the results of the Advisory Council's review.¹²⁵
62. On June 15, 2018, the Oglala Sioux Tribe provided the Staff with the updated version of its June 12, 2018 proposal:¹²⁶
- A. The Tribe's June 15, 2018 proposal included the following elements identical to the Tribe's June 12, 2018 proposal:
 - i. The proposal stated that "the prerequisites set out in the [June 8, 2018 memo circulated by Travis Stills] must be satisfied before any cultural resources survey activities may take place that involve Lakota peoples or Lakota cultural, historical, or spiritual knowledge."¹²⁷

¹¹⁹ *Id.* at unnumbered page 5.

¹²⁰ *Id.* at unnumbered pages 4–5.

¹²¹ *Id.* at 5.

¹²² *Id.* at unnumbered pages 1–5.

¹²³ Oglala Sioux Tribe Advisory Council Meeting Agenda (June 13, 2018) (ADAMS Accession No. ML18173A206).

¹²⁴ Email to K. White, Acting THPO, Oglala Sioux Tribe, from D. Diaz-Toro, NRC (June 15, 2018) (ADAMS Accession No. ML18173A264) [hereinafter June 15, 2018 Email].

¹²⁵ Email to E. Monteith, NRC, from T. Stills, Counsel for Oglala Sioux Tribe (June 14, 2018) (ADAMS Accession No. ML18173A232).

¹²⁶ Memorandum from Kyle White, Acting THPO, Oglala Sioux Tribe, to Diana Diaz-Toro, NRC, Emily Monteith, NRC, and Paul Nickens, SC&A (June 15, 2018) (ADAMS Accession No. ML18170A155) (non-public) (Attachment 4).

¹²⁷ *Id.* at 1.

- ii. The proposal described the June tribal field survey effort as “preliminary work” based on an “analysis of publicly available information, and Powertech’s proposed siting of it facilities [sic].”¹²⁸
 - iii. The Tribe’s proposal would entail the involvement and remuneration of several dozen Oglala Sioux Tribe technical staff, spiritual leaders, elders, and warrior society leaders.¹²⁹
 - iv. The Tribe’s proposal would entail using the Staff’s contractor for specific aspects of the approach.¹³⁰
 - v. The Tribe’s proposal would entail visits and encampments by the Oglala Sioux Tribe elders at the Dewey-Burdock site over several days during the different seasons of the year.¹³¹
 - vi. The Tribe’s proposal would entail a 10-meter transect-based tribal cultural field survey of the entire Dewey-Burdock site. The memorandum states that “10m intervals are required to obtain locations of TCPs which have been overlooked in past archaeological surveys.”¹³²
 - vii. The Tribe’s proposal would require more than a year to complete the fieldwork associated with the tribal cultural field survey and the oral history research and interviews.¹³³
 - viii. By the Tribe’s estimation, the “full budget to carry out a survey that OST considers adequate to identify and protect cultural resources” would exceed \$2 million.¹³⁴ The cost estimate for the Tribe’s proposal does not include (i.e., would be in addition to) the costs directly billable to Powertech for the Staff’s time and contractor support.¹³⁵
 - ix. The Tribe’s proposal does not take into account or make provision for the involvement of other Tribes in the approach.¹³⁶
- B. The Tribe’s June 15, 2018 proposal also included additional new elements:
- i. The Tribe’s proposal would require the examination of areas over 20 miles from the Dewey-Burdock site.¹³⁷

¹²⁸ *Id.* at 2.

¹²⁹ *Id.* at 1–6.

¹³⁰ *Id.* at 3.

¹³¹ *Id.* at 2–3.

¹³² *Id.* at 4.

¹³³ *Id.* at 6.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 1–6.

¹³⁷ *Id.* at 4.

- ii. The Tribe would require the Staff to consult on a government-to-government basis with both the Oglala Sioux Tribe and the Tribe's traditional leaders and government.¹³⁸
 - iii. The Tribe would require the NRC Tribal Liaison Branch to be present at all meetings with the Tribe.¹³⁹
 - C. The Tribe concluded in its proposal that "[i]t is now NRC's task to either accept the OST proposal or to propose an approach that limits the OST-proposed survey methodology to meet what NRC considers a reasonable budget. We also understand that NRC will make the final decision on the type of survey that NRC carries out, and the OST requests the opportunity to review and consult on NRC's proposal before it is finalized."¹⁴⁰
63. In a filing dated July 16, 2018, the Tribe asserted that its June 15, 2018 proposal was offered "as a discussion draft," in the expectation "that the parties could then negotiate an approach acceptable to NRC Staff that incorporated as much as possible of the Tribe's proposal within the timing and budget restraints of the March 2018 approach."¹⁴¹ The Tribe stated that the Staff "never proposed any cultural resource survey methodology" and its "development of a survey methodology was necessitated by the NRC Staff's continued reliance on an informal open site survey instead of a methodologically sound survey developed by qualified contractors, with the Tribe's input."¹⁴²
64. On June 15, 2018, the Staff informed the Oglala Sioux Tribe that, as a result of the Tribe's June 12 and June 15 proposals, the Staff had decided to discontinue the remainder of the June 11–22 fieldwork effort.¹⁴³
65. On July 2, 2018, the Staff responded to the Oglala Sioux Tribe's June 12 and June 15 proposals:¹⁴⁴
- A. The Staff informed the Tribe that its proposal outlined an approach that is fundamentally incompatible with implementation of the selected approach, which was previously negotiated with the Tribe and parties and presented to the Board.
 - B. The Staff stated that the Tribe's proposal included a wide range of activities and milestones that were not part of the negotiated approach; entailed a significantly larger scope, cost, and time to implement than the selected approach; and did not appear to contemplate the participation of other Tribes or the costs associated with involving other Tribes in such an approach.

¹³⁸ *Id.* at 4–5.

¹³⁹ *Id.* at 5.

¹⁴⁰ *Id.*

¹⁴¹ Oglala Sioux Tribe's Response to NRC Staff Motion to Set Filing for Summary Disposition Motions (Jul. 16, 2018) (ADAMS Accession No. 18200A183), at 2.

¹⁴² *Id.*

¹⁴³ June 15, 2018 Email; Email to T. Stills, Counsel for the Oglala Sioux Tribe, from E. Monteith, NRC (Jun. 15, 2018) (ADAMS Accession No. ML18173A266).

¹⁴⁴ Letter from Cinthya I. Román, Chief, Environmental Review Branch, to Kyle White, Acting Historic Preservation Officer, Oglala Sioux Tribe (Jul. 2, 2018) (ADAMS Accession No. ML18183A304)

- C. In response to the Tribe's June 15, 2018, request to accept its proposal or propose an alternative approach that tailored the Tribe's proposal to meet a reasonable budget, the Staff informed the Tribe that it considered the selected approach to be a reasonable approach that is not cost-prohibitive to implement, and that the selected approach reflected a reasoned assessment of both scope and cost and was premised upon extensive discussions with the Tribe and licensee.
 - D. The Staff stated that the Tribe's participation in the selected approach was essential to that approach, and given how far apart the Tribe's proposal was from the selected approach, the Staff determined that it could not reach alignment with the Tribe on an approach to resolve the outstanding contention in this proceeding.
 - E. The Staff informed the Tribe that it had determined that the appropriate course of action was to discontinue its efforts to implement the selected approach.
66. In July 2018, the Staff's contractor prepared a report documenting observations made at the Dewey-Burdock site during the week of June 11, 2018.¹⁴⁵
67. On July 12, 2018, the Staff informed the remaining invited Tribes that it had discontinued its efforts to implement the selected approach.¹⁴⁶

¹⁴⁵ Summary of Tribal Cultural Heritage Resources Data Acquired in June 2018 at the Dewey-Burdock In Situ Uranium Recovery Project, Fall River and Custer Counties, South Dakota (July 2018) (ADAMS Accession No. ML18211A580).

¹⁴⁶ Letter to Tribes from Cinthya I. Román, NRC (May 24, 2018) (ADAMS Accession Nos. ML18193B099, ML18193B098, ML18193B101, ML18193B097, ML18193B106, ML18193B100).

August 17, 2018

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
POWERTECH USA, INC.)	Docket No. 40-9075-MLA
)	
(Dewey-Burdock)	
In Situ Uranium Recovery Facility))	

AFFIDAVIT OF DIANA DIAZ-TORO CONCERNING THE NRC STAFF'S
MOTION FOR SUMMARY DISPOSITION OF CONTENTION 1A

I, Diana Diaz-Toro, hereby state as follows:

1. I am a Project Manager in the Nuclear Regulatory Commission's (NRC's) Office of Nuclear Material Safety and Safeguards (NMSS), Division of Fuel Cycle Safety, Safeguards and Environmental Review (FCSE), Environmental Review Branch (ERB). My responsibilities include environmental project management of licensing and regulatory actions (e.g., applications for new licenses, license renewals, and license amendments) involving nuclear materials and waste (e.g., applications associated with uranium recovery, spent fuel storage and transportation, uranium enrichment, uranium conversion, and fuel fabrication facilities). I have served as co-Project Manager for the environmental review associated with the materials license application for the Dewey-Burdock in-situ uranium recovery (ISR) facility since 2015. In that role, I have been responsible for consultation efforts between the NRC and the Oglala Sioux Tribe pursuant to the NRC's obligations under the National Historic Preservation Act of 1966 (NHPA) and for developing and implementing the Staff's approach for obtaining additional information about historic, cultural, and religious resources of significance to the Lakota Sioux Tribes in accordance with the National Environmental Policy Act of 1969 (NEPA).

2. As a Project Manager at the NRC, I plan, coordinate, and participate in projects involving the environmental review of materials and waste licensing and regulatory actions. I am responsible for preparing environmental impact statements (EISs) and environmental assessments (EAs). I also provide technical assistance on environmental reviews managed by other NRC staff, review NEPA and NHPA documents, analyze and determine NEPA and NHPA documentation requirements, and contribute to the development of NRC guidance associated with the preparation of NEPA and NHPA documents. I also plan and coordinate outreach activities as part of the NEPA and NHPA reviews. Prior to my current Project Manager position, I was the Branch Chief of the former Environmental Review Branch A in the NRC's now-defunct Office of Federal and State Materials and Environmental Management Programs. As a Branch Chief, I led and managed technical teams of project managers and scientists who perform environmental reviews and prepare EISs and EAs. I also coordinated and led public outreach activities to inform and engage the communities and members of the public about the NRC's environmental review process.

3. The purpose of this affidavit is to describe the Staff's assessment of the information developed as a result of the partial implementation of the Staff's selected approach, dated March 16, 2018, for obtaining additional information about historic, cultural, and religious resources of significance to the Lakota Sioux Tribes in relation to the materials license application for the Dewey-Burdock site. The Statement of Material Facts (Attachment 1) more fully describes the relevant information about the Staff's development and partial implementation of the selected approach.

I. Summary of Information Assessed in the Final Supplemental Environmental Impact Statement (FSEIS)

4. In the FSEIS for the Dewey-Burdock ISR project, the Staff described the historic, cultural, and archaeological setting of the geographic region where the Dewey-Burdock ISR facility would be constructed (Ex. NRC-008-A-1, FSEIS, at 173–288). The FSEIS explained that

the Dewey-Burdock ISR project would be located on the southwestern edge of the Black Hills Uplift within the geographical area known as the Great Plains, and that the Black Hills is considered a place of utmost spiritual importance to tribal groups in the region (Ex. NRC-008-A-1, FSEIS, at 245–57). The FSEIS described the cultural history of the Black Hills with reference to the Lakota Sioux's connection to the area, including the religious and cultural significance of the Black Hills to the Lakota Sioux (Ex. NRC-008-A-1, FSEIS, at 247–57).

5. With respect to gathering information on cultural resources of significance to the Tribes that may be impacted by the Dewey-Burdock ISR project, the FSEIS documented the cultural resources investigations for the proposed Dewey-Burdock ISR project, which included (i) a review of available archaeological, ethnographic and ethnological literature; (ii) a search and evaluation of archaeological records and collections maintained by the South Dakota Archaeological Research Center (ARC); (iii) archaeological field investigations including evaluative testing; (iv) a visual effects assessment; (v) preparation of an ethnohistoric background study; and (vi) tribal consultation, including a tribal field survey, to assist in the identification of places of religious or cultural importance to Native American Tribes (Ex. NRC-008-A-1, FSEIS, at 245). The Staff also completed an assessment of potential visual impacts on historic properties (i.e., properties of any type listed in or considered eligible for listing in the National Register of Historic Places (NRHP)) in consultation with the South Dakota State Historic Preservation Officer (SHPO) and other consulting parties (Ex. NRC-008-A-1, FSEIS, at 263–65; Ex. NRC-008-A-2, FSEIS, at 483–92).

6. With respect to information about Lakota Sioux cultural resources, the Staff evaluated the information that it was able to obtain without the specific input of the Lakota Sioux Tribes. For example, in Chapter 3 of the FSEIS, the Staff described various types of features and sites that could be considered places of religious and cultural importance to the Northern Plains Tribes (Ex. NRC-008-A-1, FSEIS, at 257–59). The Lakota Sioux Tribes did not provide

input to the Staff that would specifically identify and evaluate sites of significance to the Lakota Sioux Tribes.

7. In the FSEIS, the Staff evaluated potential impacts on historic and cultural resources from construction, operations, aquifer restoration, and decommissioning associated with the Class V injection well disposal option and with the land application liquid waste disposal option at the proposed Dewey-Burdock ISR project. The Staff evaluated how these activities could impact all identified sites within the area of potential effects, not merely those sites that were determined eligible for listing on the NRHP. The Staff presented its impact determinations in Tables 4.9-1 through 4.9-5 in the FSEIS, along with recommended measures to avoid or mitigate these impacts (Ex. NRC-008-A-2, FSEIS, at 466–82). Table 4.9-7 in the FSEIS summarized the NRC Staff's overall impact determinations to historic and cultural resources from construction (potential impacts would range from SMALL to LARGE), operations (potential impacts would range from SMALL to MODERATE), aquifer restoration (potential impacts would range from SMALL to MODERATE), and decommissioning (potential impacts would be SMALL) of the Dewey-Burdock ISR project (Ex. NRC-008-A-2, FSEIS, at 495).

II. Summary and Assessment of Information Developed as a Result of Partial Implementation of Selected Approach

8. On March 16 and April 12, 2018, the NRC Staff presented its selected approach for obtaining additional information about historic, cultural, and religious resources of significance to the Tribes invited to participate in the approach. The elements of the selected approach are described in the Staff's Statement of Material Facts (Attachment 1). The selected approach was intended to obtain additional information about the presence of sites or significance of known sites of historic, cultural, and religious significance to the Lakota Sioux Tribes. The additional information may have allowed the Staff, in its FSEIS, to more particularly evaluate the potential impacts of the Dewey-Burdock ISR project on those sites of historic, cultural, and religious significance to the Lakota Sioux Tribes specifically, and to identify any

appropriate additional mitigation or avoidance measures. In May 2018, the Staff awarded a task order (contract) to Sanford Cohen and Associates, Inc. (SC&A) to serve as its contractor to facilitate implementation of the selected approach. At the request of the Staff, SC&A prepared a literature review report, "Compilation and Evaluation of Existing Information for the National Environmental Policy Act Review of Lakota Historic, Cultural, and Religious Resources for the Dewey-Burdock In Situ Uranium Recovery Project, Fall River and Custer Counties, South Dakota." The report documented the contractor's review of existing information and literature available about historic, cultural, and religious resources of significance to the Tribes invited to participate in field survey and oral history interviews for the Dewey-Burdock ISR project. The report focused on information pertaining specifically to the Dewey-Burdock ISR project area, as well as the immediate region. On June 7, 2018, the contractor provided the literature review report to the invited Tribes.

9. On June 11 and 12, 2018, at the request of the Oglala Sioux Tribe, I and Dr. Paul Nickens of SC&A met with the Oglala Sioux Tribe in Pine Ridge, South Dakota, to continue discussions from the previous week about the survey methodology. On June 13, 2018, at the request of the Oglala Sioux Tribe, I and Dr. Nickens attended the meeting of the Oglala Sioux Tribe's Cultural Affairs and Historic Preservation Advisory Council for the purpose of answering any questions about the Dewey-Burdock ISR project and the selected approach. No other Tribes were present at these meetings. In addition, none of the invited Tribes arrived at the Dewey-Burdock ISR project site between June 11 and 14, 2018, to participate in the first phase of the tribal field survey. Accordingly, no additional information about the presence of sites of historic, cultural, and religious significance to the Lakota Sioux Tribes at the Dewey-Burdock ISR project site, or additional information about the significance of known tribal sites to the Lakota Sioux Tribes, was obtained.

10. Also during the week of June 11, 2018, the Staff's contractor re-visited 20 tribal sites identified during the 2013 tribal field survey that lie within the designated area of potential

effects to precisely identify the coordinates of tribal sites and document basic descriptive information about these known tribal sites. The contractor also conducted a viewshed analysis to determine whether any of the known places of tribal cultural or religious significance that occur within the area, as identified by the SC&A's literature review, could be seen from the project area. The Staff's contractor determined that no known place of cultural or religious significance to the Tribes lying beyond the license area boundaries can be seen from within the Dewey-Burdock ISR project site. Finally, the contractor evaluated the status of bald eagle nesting within the Dewey-Burdock ISR project area. The FSEIS discussed the presence of two bald eagle nests within the Dewey-Burdock ISR project site (Ex. NRC-008-A-1, FSEIS, at 233). The existence of these nests was noted by the Tribal Historic Preservation Officer for the Rosebud Sioux Tribe during a teleconference with the Staff and its contractor on June 5, 2018. During the June 2018 field observations, the contractor confirmed that one of the nests was no longer present. These efforts are documented in a report entitled "Summary of the Tribal Cultural Heritage Resources Data Acquired in June 2018 at the Dewey-Burdock In Situ Uranium Recovery Project, Fall River and Custer Counties, South Dakota."

11. These two reports do not identify new sites of historic, cultural, or religious significance to Lakota Sioux Tribes. These reports also do not contain information from the Lakota Sioux Tribes regarding the significance of the already-identified tribal sites at the Dewey-Burdock ISR project site to the Lakota Sioux Tribes. Accordingly, this information does not alter the Staff's evaluation and impact determinations for cultural resources of significance to Native American Tribes in the FSEIS. The information described in the literature review report, as well as the information in the field observations report relating to the viewshed observations, revisiting known tribal sites, and an eagle's nest at the Dewey-Burdock ISR project site, do not provide materially different information from the information already assessed by the Staff in the FSEIS. The information described in the literature review report reinforces the Staff's determination in the FSEIS that the region where the Dewey-Burdock ISR facility would be

situated is of significance to the Lakota Sioux Tribes. It does not, however, alter the FSEIS's impact determinations, because it does not provide any additional information about the presence of sites of historic, cultural, and religious significance to the Lakota Sioux Tribes at the Dewey-Burdock ISR project site, or additional information about the significance of known tribal sites to the Lakota Sioux Tribes. With respect to the information in the field observations report, the viewshed observation did not result in a materially different understanding of the impacts of the Dewey-Burdock ISR project on cultural resources from the results of the previous assessment in the FSEIS. The information on known tribal sites was basic descriptive information, including locational information, gathered to aid the Tribes in their participation in the tribal field survey; these sites were already assessed by the Staff in the FSEIS. The FSEIS also already evaluated the presence of two bald eagle nests at the Dewey-Burdock ISR project site and associated mitigation measures; the field observation revealed that only one nest is now extant. Accordingly, the information obtained by the Staff during the partial implementation of the selected approach does not alter the Staff's analysis and conclusions in the FSEIS regarding the potential impacts of the Dewey-Burdock ISR project on cultural resources.

12. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed in Accord with
10 CFR 2.304(d)

Diana Diaz-Toro

Executed in San Juan, Puerto Rico
this 17th day of August, 2018

Attachment 3

Oglala Sioux Tribe's June 12 Proposal: Discussion Draft – Cultural Resource Survey Methodologies

Because this document remains non-public in ADAMS (as explained in the Staff's letter to the Board dated July 2, 2018), this attachment was filed with the Board and Oglala Sioux Tribe via non-public Electronic Information Exchange in this proceeding on August 17, 2018.

Attachment 4

Oglala Sioux Tribe's June 15 Proposal: Second Discussion Draft – Cultural Resource Survey Methodologies

Because this document remains non-public in ADAMS (as explained in the Staff's letter to the Board dated July 2, 2018), this attachment was filed with the Board and Oglala Sioux Tribe via non-public Electronic Information Exchange in this proceeding on August 17, 2018.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
POWERTECH (USA) INC)	Docket No. 40-9075-MLA
)	
(Dewey-Burdock In Situ Uranium Recovery)	Date: August 17, 2018
Facility))	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the "NRC Staff's Motion for Summary Disposition of Contention 1A" in this proceeding have been served via the Electronic Information Exchange (EIE), the NRC's E-Filing System, this 17th day of August, 2018. Counsel for the Staff served those representatives exempted from filing through the EIE with copies of its update by electronic mail, also on August 17, 2018.

***/Signed (electronically) by/
Emily Monteith***

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